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SUPREME COURT OF THE STATE OF SOUTH DAKOTA

No. 8869

LEO SCHMITT,
Plaintiff and Respondent,

vs.

W. R. WILDER, AS DIRECTOR OF THE DIVISION OF LICENSING OF THE STATE OF SOUTH DAKOTA, ET AL.,
Defendants and Appellants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, Leo Schmitt, plaintiff herein, submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of South Dakota entered in this case on June 23, 1947, which became final for purposes of review on December 12, 1947, when the said Court denied a petition for rehearing seasonably filed and entertained. A petition for appeal is presented to the Supreme Court of the State of South Dakota herewith, to wit, on March 8, 1948.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review on appeal the final judgment of the Supreme Court of South Dakota in this cause is conferred

by Sec. 237(a) of the Judicial Code, as amended (36 Stat. 1156; 39 Stat. 726; 43 Stat. 937; 45 Stat. 54; 45 Stat. 406; 28 U. S. C. 344(a), 861a, 861b).

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 287-289; *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S. 548, 551; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-268; *Nickey* v. *Mississippi*, 292 U. S. 393, 394; *Charleston Assn.* v. *Alderson*, 324 U. S. 182, 185-186.

Statute the Validity of Which Is Involved

This case involves the validity of Chapter 57.40 and Sections 57.9936 and 57.9937 of the South Dakota Code of 1939 (Vol. 3, pp. 1019-1020, 1030), all of which were originally enacted as Chapter 258 of the 1931 Session Laws of South Dakota (pp. 319-320), and which are set out verbatim below:

> 57.4001. There is levied and assessed and shall be collected and paid to the State Treasurer a tax of ten cents upon each pound of butter substitute sold in South Dakota to consumers, to be paid prior to or at the time of the sale and delivery to the consumer. Before any package containing such substitute for butter is delivered to the consumer or offered or exposed or kept for sale in open cartons or removed from such cartons, each package shall have securely affixed thereto suitable stamp or stamps denoting the tax thereon. The display or possession by any dealer of any package, except in original unopened cartons or other containers, which do not bear the required stamp or stamps, shall constitute prima facie evidence of violation of this section. Such stamps shall be properly affixed and cancelled prior to such display or removal for consumption, under such regulations as the State Treasurer shall prescribe. When such substitutes for butter are sold by a retail dealer, to consumers in cartons or other original un-

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opened containers, said stamps, properly cancelled, may be affixed to each such original unopened carton or container and not to each package contained therein.

57.4002. The State Auditor shall prepare and have suitable stamps for use under the provisions of this chapter. Upon requisition from the State Treasurer the State Auditor shall deliver to his order the stamps designated in such requisition and shall charge the Treasurer of the state with stamps thus delivered, and shall keep an accurate record of all stamps coming into and leaving his hands.

57.4003. The money received by the State Treasurer from the stamp taxes herein imposed shall be credited by the State Treasurer to the general fund of the state. From the total amount of taxes to be raised by levy against real and personal property a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this chapter, and the balance only, after such reduction has been made, shall be levied against such real and personal property. It shall be and is made mandatory on all officers concerned to make such reductions.

57.4004. In the enforcement of this chapter the Secretary of Agriculture, through his Division of Inspections, and the State Treasurer may call to their aid the Attorney General and the state's attorney or any police officer. The duties imposed herein upon the Secretary of Agriculture shall be performed contemporaneously with the performance of the other duties of his Department.

57.9936. Any person who shall violate any of the provisions of chapter 57.40, requiring the affixing of butter substitute tax stamps to any such product sold or held in possession for the purpose of sale, shall be guilty of a misdemeanor and punishable by a fine of not less than fifty dollars nor more than one hundred dollars or imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment.

57.9937. It shall be unlawful for any person not authorized thereby, with the intent to defraud the state, to make or forge or to counterfeit any stamp or stamps provided for in chapter 57.40, relating to butter substitute taxation, or to have in possession any such forged, counterfeited, spurious, or altered stamp, knowing the same to be forged, counterfeited, spurious, or altered; or knowingly or wilfully to cheat, defraud, or deprive the state of any tax or revenue imposed by such chapter, and whoever is found guilty of any violation of the provisions of this section shall be fined not more than one thousand dollars, and be imprisoned in the State Penitentiary not more than three years.

The Nature of the Case and the Rulings Below

Plaintiff, the owner and operator of a meat market and grocery store in Alexandria, South Dakota, filed his complaint in this case on April 26, 1944, in the Circuit Court of Hanson County, South Dakota, against the Director of the Division of Licensing, the State Treasurer, and the Attorney General of South Dakota, and the State's Attorney and the Sheriff of Hanson County, South Dakota. The complaint alleged, among other things, that for a number of years before the enactment in 1931 of the above-quoted statute imposing a tax of ten cents on each pound of butter substitute (oleomargarine) sold in South Dakota to consumers, plaintiff had sold substantial quantities of oleomargarine at retail at a reasonable profit; that the tax has destroyed his business in selling oleomargarine and likewise has destroyed the sale and consumption of oleomargarine throughout the state of South Dakota; and that the statute was enacted not for the purpose of raising revenue but to destroy the sale of oleomargarine in the state and thereby to protect the butter industry. The complaint charged that the statute is violative of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, as well as various provisions of the

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State Constitution, and prayed that the defendants be enjoined from collecting the tax and from enforcing the statute.

The defendants answered denying that the purpose and effect of the statute are to destroy the sale of oleomargarine, and alleging that its sole purpose is to raise revenue. The defendants further alleged that the oleomargarine industry is in direct competition with the butter industry, that the oleomargarine industry had not been paying its just share of the tax burden, and that the statute "was enacted for the purpose of equalizing, to some extent, the tax burden, as between the dairy farmer and the oleomargarine and so-called 'butter substitute' industry."

After trial, the circuit court rendered an opinion holding that the primary purpose of the statute, both on its face and from its legislative history, is to curtail drastically or prohibit the sale of oleomargarine in the state and not to raise revenue, and that it had actually had such an effect. The circuit court concluded that the statute is violative of both the due process and equal protection clauses of the 14th Amendment, as well as several provisions of the state constitution.

Thereafter, the circuit court made findings of fact which may be summarized as follows: Oleomargarine is a pure, wholesome, and nutritious food manufactured and sold in conformity with standards promulgated by the Federal Security Administrator effective September 6, 1941 (6 F.R. 2762), pursuant to the Federal Food, Drug and Cosmetic Act of 1938 (21 U.S.C. 341, 371). Under those standards, it is sold with proper label in such a manner as to prevent confusing or misleading prospective purchasers. The tax levied by the statute has at all times since its enactment averaged more than 40% of the retail price of oleomargarine exclusive of the tax, and has required a ten cent increase in the retail price of the product. The primary

purpose of the legislature in enacting the statute was not to raise revenue but to prohibit the sale and consumption of oleomargarine, and thereby to benefit the butter industry which is not subjected to such a tax. The statute has actually had that effect, and has completely destroyed both plaintiff's business in retailing oleomargarine and the sale and consumption of the product throughout the state.[1]

The circuit court also found that the legislative history of the statute demonstrates that its purpose is to prohibit and not to tax. Thus, the circuit court found that in 1929 the South Dakota Tax Conference (which included the South Dakota Tax Commission and members of the South Dakota Legislature) drafted and submitted to the legislature a program for the 1931 session including a proposed bill taxing oleomargarine, with the following recommendation:

> "This tax will operate to the benefit of the dairy industry in reducing the amount of such substitutes used or, if the sale of butter substitutes is not curtailed, will be a fair revenue producer. As between the two possibilities, we would prefer that it operate in a reduction of the use of butter substitutes. If this is the result the dairy interests may well afford to pay the tax in some other way."

The Division of Taxation of South Dakota in its annual report for 1929-30 also recommended enactment of an oleomargarine tax, using the same language as quoted above. On the opening day of the 1931 session the Governor of the state in a message to the legislature recommended the adoption of the bill proposed by the Tax Conference. Except for changes in Section 5 of the bill (now Section

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[1] The Circuit Court found that after the entry of the United States into the war and the rationing of food, including butter, there were some sales of oleomargarine in the State, but that those sales would subside after rationing was lifted.

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57.4003) the statute as enacted is identical with that recommended by the Tax Conference, the Division of Taxation, and the Governor.

The circuit court concluded as a matter of law that the statute is violative of the due process and equal protection clauses of the 14th Amendment, as well as various provisions of the state constitution. On November 23, 1945, the circuit court entered its judgment enjoining the defendants from enforcing the provisions and penalties of the statute or collecting its taxes.

The defendants appealed to the Supreme Court of the State of South Dakota assigning error to the entry of the judgment, to all of the trial court's conclusions of law including those that the statute violates the 14th Amendment, and to all of the findings of fact summarized above, except for the finding that oleomargarine is pure, wholesome, and nutritious and is sold in such a way as to prevent confusing or misleading customers.

The Supreme Court of South Dakota rendered its opinion on June 23, 1947, holding the statute valid in all respects. The Supreme Court agreed that the proof shows that the tax destroyed plaintiff's business of selling oleomargarine and that "its burdensome nature may give rise to strong suspicion of a purpose to prohibit . . ." It reasoned, however, (1) that the statute states that its purpose is to tax; (2) that the legislature had the power to impose an excise tax of this type; (3) that its burdensome and prohibitory nature is not enough to warrant a conclusion that the primary purpose of the legislature was to inhibit and not to tax; and (4) that no matter how suspicious the statute on its face, it is beyond a court's competence to consider legislative history to determine its purpose. The State Supreme Court in its opinion expressly held that the statute is not repugnant to either the due process clause or the equal protection clause of the 14th Amendment to the Fed-

eral Constitution. In reaching this conclusion, it relied heavily upon *Magnano Co.* v. *Hamilton*, 292 U. S. 40.

On June 23, 1947, the Supreme Court of South Dakota, which is the highest court of the state (South Dakota Code of 1939, Vol. 2, Sec. 32.0901, p. 138 and Sec. 33.0730, p. 197), entered its judgment reversing the judgment below and remanding the cause to the circuit court with directions to enter a judgment dismissing plaintiff's complaint on the merits. A timely petition for rehearing was filed by plaintiff, entertained by the State Supreme Court, and denied by that Court on December 12, 1947. In his petition for appeal to the Supreme Court of the United States, plaintiff assigns error to the final judgment of the State Supreme Court and to its holding that the statute violates neither the due process clause nor the equal protection clause of the 14th Amendment to the Federal Constitution.

The Questions Involved Are Substantial

It is conceded in this case that oleomargarine manufactured and sold in conformity with standards promulgated by the Federal Security Administrator effective September 6, 1941 (6 F.R. 2762), pursuant to the Federal Food, Drug and Cosmetic Act of 1938 (21 U.S.C. Secs. 341, 371), is a pure, wholesome, and nutritious food and is sold in such a manner as to prevent confusing or misleading customers.[2] The state therefore has no authority to prohibit the sale of oleomargarine by direct legislation under its police power.[3] The defendants have never contended that

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[2] The complaint alleged and the defendants' answer admitted that oleomargarine is pure, wholesome and nutritious. The circuit court found both that it is wholesome and that it is sold in such a manner as to preclude deception. The defendants did not assign error to those findings in their appeal to the State Supreme Court.

[3] *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402 (holding that a state statute prohibiting the use of shoddy in comfortables was violative of due process, since not reasonably necessary to the protection of public health

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such power existed or that the statute could be supported on that basis. The South Dakota Supreme Court in effect conceded in its opinion that such direct legislation would be invalid. The question here, therefore, is whether the state can accomplish indirectly by taxation what it could not do by direct legislation.

We think that the South Dakota Supreme Court erred in holding that the statute is not repugnant to the due process clause of the 14th Amendment. Particularly, it erred in concluding (contrary to the circuit court), first, that the statute does not show on its face and by its necessary interpretation and effect that its primary purpose is to prohibit the sale of oleomargarine and not to raise revenue, and, second, that no matter how strong the suspicion of a prohibitory purpose a court cannot look at the legislative history to confirm that suspicion. We further believe that the State Supreme Court was in error in concluding that

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or the prevention of deception); see also *Field Packing Co.* v. *Glenn*, 5 F. Supp. 4, modified and affirmed, 290 U. S. 177. The cases of *Powell* v. *Pennsylvania*, 127 U. S. 678; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *McCray* v. *United States*, 195 U. S. 27 and *Hammond Packing Co.* v. *Montana*, 233 U. S. 331, all involving oleomargarine, are not to the contrary, since all were based on the now discarded view that some oleomargarine was not wholesome or could be sold deceptively as butter. The Supreme Court of the United States found in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, and *Collins* v. *New Hampshire*, 171 U. S. 30, that oleomargarine was wholesome and a legitimate article of commerce. The cases cited above post-dating these two decisions are based on the conclusion that oleomargarine could be sold deceptively. The statute in the case at bar could not, of course, be aimed at deception since in practical effect it relates only to uncolored oleomargarine; the sale of colored oleomargarine has been prohibited, and the full marking and branding of uncolored oleomargarine required, by South Dakota since 1909 (South Dakota Code of 1939, Vol. 1, Sec. 22.0512, p. 938). It is also implicit in *Magnano Co.* v. *Hamilton*, 292 U. S. 40, that the sale of all oleomargarine, both uncolored and colored, could not lawfully be prohibited by direct legislation. It has been held in the state courts that statutes prohibiting the sale of uncolored oleomargarine are unconstitutional. *People* v. *Marx*, 99 N. Y. 377, 2 N. E. 29; *Jelke Co.* v. *Emery*, 193 Wis. 311, 214 N. W. 369.

the decision in *Magnano Co.* v. *Hamilton*, 292 U. S. 40, is controlling here.

This case is distinguishable from the Magnano case. The statute attacked in the *Magnano* case expressly declared that state revenues were inadequate and that the tax was enacted to provide additional revenues. The instant statute, however, provides that, "From the total amount of taxes to be raised by levy against real and personal property a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this chapter, and the balance only, after such reduction has been made, shall be levied against such real and personal property." This provision, together with the prohibitory amount of the tax, makes it clear that the legislative purpose was to destroy the sale of oleomargarine or, if by chance that purpose should fail, at least to benefit the dairy farmers, who are large holders of real and personal property, by reducing their taxes in the amount collected from the oleomargarine tax. This purpose squares precisely with that stated by the South Dakota Tax Conference and the Division of Taxation of South Dakota in recommending passage of the legislation.

Further, in the *Magnano* case there were no findings by the trial court that the statute had been directly responsible for the destruction of all the oleomargarine business in the state, or that the primary purpose of the Act was to prohibit rather than to tax. The Supreme Court of the United States in that case conceded merely that the tax would destroy the business of the plaintiff, and held that this alone was not sufficient ground for finding the tax unconstitutional. In the case at bar, the trial court expressly found that both the purpose and the actual effect of the statute were to destroy all or substantially all oleomargarine sales in the state. The State Supreme Court did not question

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those findings, except for its legal conclusion that the statute did not demonstrate such a purpose on its face.

If the Magnano decision is controlling here, it should be reconsidered. If the *Magnano* case is construed to mean that even where a tax is so excessive that it is clear on its face it will prohibit all sales, where it has actually had that effect, and where the legislative history plainly demonstrates that such was its purpose, the courts are not permitted to consider legislative purpose or to declare the statute unconstitutional, we respectfully submit that it is inconsistent with principles announced in other decisions of the United States Supreme Court and should be reconsidered.

We have no quarrel with the rule that where a legislature has levied a tax on a subject within its power for a proper revenue purpose, the courts should not inquire into hidden motives,[4] nor strike the tax down because it is too burdensome.[5] Also, we agree with the principle stated in the *Magnano* and other decisions that a tax is bad under the due process clause of the 14th Amendment only if "its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state."[6]

We question the apparent holding in *Magnano*, however, that no matter how excessive the tax or what its actual effect on an industry, such factors cannot be accepted as

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[4] *Magnano Co.* v. *Hamilton, supra*, p. 44; *McCray* v. *United States*, 195 U. S. 27, 56; *Sonzinsky* v. *United States*, 300 U. S. 506, 513-514.

[5] *Magnano Co.* v. *Hamilton, supra*, p. 44; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48; *McCray* v. *United States, supra*, p. 56; *Sonzinsky* v. *United States, supra*, p. 513.

[6] *Magnano Co.* v. *Hamilton*, pp. 44-45; *Child Labor Tax Case*, 259 U. S. 20, 37-43; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100; *McCray* v. *United States, supra*, p. 60.

determinative of a legislative purpose to prohibit under the guise of a tax. The Supreme Court of the United States has often held that a tax statute enacted to penalize for, or compel, conduct beyond the legislative power to direct is invalid.[7] In several of those cases, the Court has stated that it is not bound by the legislature's naming it a tax but must look to the actual operation of the statute.[8] Moreover, in a number of the cases, the Court has relied heavily on the excessive nature of the tax as indicative of a purpose to penalize or regulate, rather than to raise revenue.[9] In *Trusler* v. *Crooks*, 269 U. S. 475, the Court in holding the tax bad placed almost sole reliance on the size of the imposition as compared with the price usually paid for the transactions taxed, the fact that the result was a practical inhibition of all such transactions, and the consequent impossibility of raising any revenue from the tax.[10] And recently four Supreme Court Justices indicated that in their opinion a tax could be bad for the sole reason that it was so excessive as to be prohibitory.[11]

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[7] *Child Labor Tax Case, supra; Hill* v. *Wallace*, 259 U. S. 44; *Trusler* v. *Crooks*, 269 U. S. 475; *United States* v. *Constantine*, 296 U. S. 287; *United States* v. *Butler*, 297 U. S. 1; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Carter* v. *Carter Coal Co.*, 298 U. S. 238. Cf. *Helwig* v. *United States*, 188 U. S. 605; *Lipke* v. *Lederer*, 259 U. S. 557; *United States* v. *La Franca*, 282 U. S. 568.

[8] *United States* v. *Constantine, supra*, p. 294; *United States* v. *La Franca, supra*, p. 572; *Lipke* v. *Lederer, supra*, p. 561. See also, *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280.

[9] *Hill* v. *Wallace, supra*, p. 66; *Trusler* v. *Crooks, supra*, p. 482; *United States* v. *Constantine, supra*, p. 295; *Helwig* v. *United States, supra*, pp. 611-613.

[10] The Court, in addition, referred to the intimate relation between the section imposing the particular tax involved and the regulatory scheme held invalid in *Hill* v. *Wallace, supra*. It appears, however, that little weight was given that factor, since the section presumably was separable and had been so held in the *Hill* case.

[11] See dissent of Mr. Justice Reed, joined in by Justices Frankfurter, Jackson, and Roberts, in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 118; "This dissent does not deal with an objection which theoretically could be

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We submit that there is no valid difference in principle between a tax that compels conduct beyond the legislative power to command, and a tax so excessive as to demonstrate a purpose to prohibit transactions beyond the power of the legislature to proscribe directly.[12] In the *Child Labor* and *Grosjean* (297 U. S. 233) cases, for example, the statutes held invalid did not set up detailed systems of regulation to be followed as an alternative to payment of the taxes. The only regulation was that which resulted from the burden of the impositions. The taxes were levied on those who engaged in particular conduct, and they could be avoided by refraining from that conduct. The effect of the statutes was indirectly to inhibit what the legislatures had no power to prohibit directly. Precisely the same result occurs in the instant case. In the *Constantine* case, the heavy imposition held invalid was conditioned on violation of a state law. If the South Dakota legislature had prohibited the sale of oleomargarine and imposed the ten cent tax on those who violated the law, it would be bad under the principle of the *Constantine* case. The tax in the instant case, however, has exactly the same practical effect. Certainly, if the tax were one dollar per pound, a court would be impelled to the conclusion that the purpose was prohibitory and the statute bad. The same result should be reached in the

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made in each case, to wit, that the licenses are so excessive in amount as to be prohibitory." See also dissent of Mr. Justice Frankfurter, joined in by Mr. Justice Jackson, in the same case, p. 137: "Thus, if a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a legislature cannot directly suppress or control, of course it is bad."

[12] Writers on the subject have almost uniformly criticized the *Magnano* decision on this ground. See Cushman, Social and Economic Control through taxation (1934), 18 Minn. L. Rev. 757; J.A.C. Grant, Commerce, Production, and the Fiscal Powers of Congress (1936), 45 Yale L.J. 751, 766; Roy A. Brown, The Excise Tax as a Regulatory Device (1937), 23 Corn. L.Q. 45, 69-71; Robert C. Brown, When Is a Tax Not a Tax (1936), 9 Ind. L.J. 399, 417-420. See also, Thomas Reed Powell, Child Labor, Congress, and the Constitution (1922), 1 N.C.L. Rev. 61, 79.

case of a ten cent tax where the prohibitory purpose and effect are equally clear.[13]

It is also significant to note that the authorities relied on in the *Magnano* opinion (292 U. S. at 45) are cases where the legislature had the power to prohibit directly the activity taxed out of existence. In the *Veazie Bank* case, Congress had authority to suppress the circulation of state bank notes as an incident to its currency power. In the *Alaska Fish* case, Alaska had the power directly to prohibit the use of fish for non-food purposes. And in the *McCray* case, the court pointed out that under the then existing state of the law the manufacture of artificially colored oleomargarine could be prohibited without violation of any of the fundamental rights conferred by the Constitution.

Presumably, the Court has been reluctant to hold that the excessive nature of a tax is sufficient to prove improper purpose for fear of the impact it might have on the obviously valid rule that where a tax is for a proper revenue purpose the courts cannot hold it bad because it is too burdensome. But there should be no difficulty in keeping the two rules distinct. The rule that excessiveness demonstrates a purpose to prohibit and not to raise revenue could easily be limited to those cases in which the tax is so patently oppressive as to demonstrate or raise ineluctable suspicions that the primary legislative purpose is to inhibit all trade in a particular product.

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[13] The often-repeated statement of Chief Justice Marshall in McCulloch v. *Maryland*, 4 Wheat 316, 431, "that the power to tax involves the power to destroy," does not describe the purposes for which the tax power may be used, but vigor with which that power may be applied in raising revenue. Cooley, Taxation, 4th ed, (1924), Vol. 1, sec. 72, pp. 180-181. See also, *Knowlton* v. *Moore*, 178 U. S. 41, 60; dissent of Mr. Justice Holmes in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223; dissent of Mr. Justice Frankfurter in *Murdock* v. *Pennsylvania*, *supra*, p. 137.

We further contend that, in any event, the rule should be that if a tax is so excessive as to create suspicion in the minds of all that its purpose is to prohibit, the court is entitled to rely on the legislative history of the act. In *Grosjean* v. *American Press Co.*, 297 U. S. 233, the Court held a state statute invalid as an exercise of a forbidden power in the guise of a tax because "the form in which the tax is imposed is in itself suspicious" (p. 251), and "in the light of its history and of its present setting" (p. 250). In *United States* v. *Butler*, 297 U. S. 1, the Court looked to the provisions of another federal statute and also to a Department of Agriculture publication in support of its conclusion that the statutory purpose was to coerce.[14] In the case at bar, the trial court found that the legislative history demonstrates a purpose to prohibit and not to tax, and the State Supreme Court has not suggested that the finding lacks support in the evidence.

It is a matter of great public concern, particularly in times like these, that the production and sale of a wholesome and nutritious article of food which can be brought to consumers at a substantial saving over competitive articles

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[14] In holding the statute bad, the Court said:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another."

In the case at bar, both the face of the statute and its legislative history demonstrate that the purpose of the exaction on oleomargarine was to benefit the dairy industry.

be not forbidden. We submit that the questions involved are substantial and of wide public importance.

Respectfully submitted,

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March 8th, 1948.

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APPENDIX "A"

THE CIRCUIT COURT OF SOUTH DAKOTA, FOURTH JUDICIAL CIRCUIT, WITHIN AND FOR HANSON COUNTY, ss

LEO SCHMITT, *Plaintiff*,

vs.

ROY NORD, as Director of the Division of Licensing of the State of South Dakota, George T. Mickelson, as Attorney General of the State of South Dakota, E. V. Youngquist, as State Treasurer of the State of South Dakota, Clyde H. King, as States Attorney of Hanson County, South Dakota, and Dewey Heineman, as Sheriff of Hanson County, South Dakota, *Defendants*.

MEMORANDUM OF DECISION

The plaintiff seeks to enjoin the defendants as the responsible officials of this state from enforcing SDC 57.40 which came into our statute as Chap. 258 of the Laws of 1931 and also from enforcing SDC 57.9936 and 57.9937, all of which will be hereinafter referred to as the margarine tax law.

The plaintiff, both before and since the passage of Chap. 258 Laws of 1931 owned and operated a butcher shop and meat market in the City of Alexandria. He alleges and it is fully supported by the evidence that prior to the passage of this act he sold margarine at a substantial profit, but that the passage of this legislation in 1931 entirely destroyed the sale of margarine in his business and elsewhere thruout the state. He avers, and this too is fully supported by evidence, that his once profitable business from the sale of margarine has been permanently ruined to his great financial loss. It is plaintiff's contention that the statutes before mentioned providing as they do, a ten cent tax on all margarine sold within this state are unconstitutional for the reasons which will be hereinafter discussed.

The defendants in their answer allege that oleomargarine manufactured and compounded in conformity with the standards promulgated by the Federal Securities Adminis-

trator effective September 6th, 1941, is a pure, wholesome product and that the plaintiff was at the time the act became effective in 1931 buying margarine at wholesale and selling the same in his store at retail to his customers and that from such sales he realized a profit. Defendants for an affirmative defense to plaintiff's cause of action further in their complaint allege:

"That for further answer to the complaint of the plaintiff, the defendants allege that the State of South Dakota is an agricultural state, and that its major industry is agriculture; that the dairy industry of the State of South Dakota constitutes a major portion of the agricultural industry; that dairy cows, and farm lands and equipment necessary for their maintenance, and creamery and other similar properties, make up a major portion of the assessed valuation of all properties in this state, and that contributing heavily to the support of the state government and its various political subdivisions, and have so contributed for many years in the past, while the oleomargarine and butter substitute industry is not paying its proportionately just share of the tax burden, and has not paid its proportionately just share of the tax burden in the State of South Dakota at any time; that Chapter 258 of the Session Laws of 1931 of the State of South Dakota, now Chapter 57.40 of the South Dakota Revised Code of 1939, was enacted for the purpose of equalizing to some extent the tax burden, as between the dairy farmer and the oleomargarine and so-called 'butter substitute' industry; that the oleomargarine and butter substitute industry is in direct competition with the dairy farmer; that oleomargarine and butter substitutes can be produced at a cost of from 35 per cent to 55 per cent of the cost of butter.

"That the defendants herein further allege that there is a sufficient difference between butter and oleomargarine to justify the legislature in placing the latter in a single class for the purpose of imposing an excise upon its sale; that oleomargarine and butter are composed of entirely different elements; that the principal

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element of butter is butterfat, while oleomargarine consists basically of vegetable oil, and the cost of vegetable oil is now and always has been approximately 25 per cent of the cost of butterfat. Notwithstanding this disparity between the cost of production and the enormous quantities of oleomargarine which were sold in the state prior to the enactment of Chapter 258, Laws of 1931, said product contributed very little to the cost of government in the way of taxation."

On the trial there was received in evidence a report of the South Dakota Tax Conference held in March 1929 at Huron, South Dakota. At this conference, at which numerous representative organizations of the state were represented, including a number of members of the legislature, a resolution was adopted for submission to the next, the 1931, state legislature. This resolution provided:

"A proposal to impose a tax upon the sale of oleomargarine and lard substitutes, while incorporated in two separate bills, rests upon the same basis."

"The South Dakota farmers and dairymen are developing a great dairy industry which should be encouraged and protected in every legitimate way. The use of substitute dairy products, such as oleomargarine, limits the use and lowers the market of butter."

"A tax of ten cents per pound on butter substitutes will afford a measure of protection to the dairy interests and at the same time protect the general public from the use of substitutes inferior in every way to pure South Dakota butter."

"This tax will operate to the benefit of the dairy industry in reducing the amount of such substitutes used or, if the sale of butter substitutes is not curtailed, will be a fair revenue producer. As between the two possibilities, we would prefer that it operate in a reduction of the use of butter substitutes. If this is the result the dairy interests may well afford to pay the tax in some other way."

It further appears that in accordance with the foregoing resolution and at the same time and place there was prepared for submission at the 1931 session of the state legislature a bill providing for a ten cent tax on margarine. The first four sections of the bill so proposed are identical with the statute later enacted by the legislature as Chap. 258 of the Laws of 1931.

It further appears that Mr. B. W. Baer, then Director of the Division of Taxation, attended and participated in this Tax Conference and later and on November 1st, 1930, the Division of Taxation transmitted to the Governor of this state its annual report for the fiscal year of 1929-1930. This report was made pursuant to law and as the law provides was published in pamphlet form. Copies thereof were furnished to the Governor, the members of the legislature and to various state officers, as well as to the public in general, to the extent that the pamphlets printed made this possible. In his report Judge Baer recommended the enactment of this margarine tax and in so doing employed substantially the same identical language which was used in the resolution of the Tax Conference.

It further appears that on the opening day of the 1931 session of the state legislature the Hon. Warren E. Green, Governor of South Dakota, in his message to the legislature made the recommendation following:

> "I earnestly recommend to you serious consideration of the report submitted by the volunteer tax conference. This conference is composed of able members, representing various lines of activity in our state, who have given the subject of taxation, as it applies in South Dakota, a great deal of study. This conference has recommended the adoption of an income tax, an admission tax, a tax on all forms of tobacco, except cigarettes, on butter substitutes, and on lard substitutes."

It further appears from the evidence that the bill which later secured passage as Chap. 258 of the Laws of 1931 is House Bill No. 74 introduced by Mr. Bogue of Beresford. This bill was identical in form with the one prepared and

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proposed by the South Dakota Tax Conference, except as to Section 5 of the Conference Bill which was changed to read as follows:

"Section 5. The money received by the state treasurer from the stamp taxes herein imposed shall be credited by the state treasurer to the general fund of the state; provided, however, that from the total amount of taxes to be raised by levy against real and personal property a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this act, and the balance only, after such reduction has been made, shall be levied against such real and personal property; and provided further that it shall be made mandatory on all officers concerned to make such reductions."

Thereafter the bill was read for the second time, (see Journal of the House, page 139) and referred to the committee of assessment and taxation. On February 5, 1931, being the thirty-first day of the session, the committee of assessment and taxation presented the following report:

"Mr. Speaker:

"The Committee on Assessment and Taxation respectfully report that they have had under consideration

"House Bill No. 74.

"A Bill for an Act Entitled, An Act Imposing a Tax on the Sale of Substitutes for Butter.

"And return the same with the recommendation that said Bill be amended as follows:

"In Line 3, page 1, of the printed Bill, strike out the word 'such' and insert in lieu thereof the word 'butter'.

"Strike out 'Section 5' and insert in lieu thereof the following:

"Section 5. This act is designated as a replacement tax measure, and the object and purpose of this Act

and the imposition of the tax herein provided for, is hereby declared to be the raising of revenues to defray the general expenses of the State heretofore raised thru the taxation of real estate and the tangible personal property, and to provide revenues in aid of the common schools of the State; the intent of the legislature being to provide a means of relieving the burden of taxation hertofore imposed upon the taxable real estate and tangible personal property of the State by a more general distribution of the burden of taxation among the people of the State.

"The income and receipts accruing thru the taxation imposed by the provisions of this Act are hereby directed to be deposited in the 'Consolidation Fund' in the State Treasury, and the State Treasurer is hereby authorized and directed to distribute such receipts in accordance with the provisions of the bill known and designated as —— Bill No. ——, enacted at the same session of the legislature as is this Act, and which was approved on the —— day of ——, 1931.

"Section 6. Whereas, this Act is necessary for the immediate support of this State Government and its existing institutions, an Emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

"And that as so amended said Bill do pass.

Respectfully submitted,
E. N. HAMMERQUIST, *Chairman.*"

(See pages 258 and 259 of the House Journal for 1931.)

Thereafter on February 10, 1931, the House passed House Bill 74, as amended, and the same was offered to the Senate for consideration, where it was amended and passed by the Senate as amended, and reported back to the House on March 2, 1931, with the following message:

"MR. SPEAKER:

"I have the honor to return herewith
"House Bill No. 74.

"A bill for An Act Entitled, An Act Imposing a Tax on the Sale of Substitutes For Butter, and Declaring An Emergency.

"Which has by the Senate been amended as follows:

"By striking out the amendment made by the Assessment and Taxation Committee of the House as found on page 258 of the House Journal pertaining to Section 5 of the printed Bill and substituting therefor Section 5 of the original Bill as follows:

"Section 5. The money received by the State Treasurer from the stamp taxes herein imposed shall be credited by the State Treasurer to the general fund of the state. Provided, however, that from the total amount of taxes to be raised by levy against real and personal property a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this act, and the balance only, after such reduction has been made, shall be levied against such real and personal property, and provided further, that it shall be and is hereby made mandatory on all officers concerned to make such reductions.

"And as so amended has passed the Senate, and your concurrence in said amendment is respectfully requested."

This is in substance the history of the statute in controversy as well as of the impelling forces which led to its final passage. Just why the legislature ultimately determined to reject the form of statute conceived by the Tax Conference, the Division of Taxation and the Governor and the substance by the lower House of the Legislature, can only be conjectured. The Tax Conference was clearly motivated by the desire to raise the price of butter and, incidentally, of butterfat by discouraging the sale of mar-

garine. This they proposed to do by imposing a tax of ten cents per pound on margarine. They said:

> "A tax of ten cents per pound on butter substitutes will afford *a measure of protection to the dairy interests,* and at the same time protect the general public from the use of substitutes."

And also:

> "This tax will operate to the benefit of the dairy industry in reducing the amount of such substitutes used * * * or if the sale of butter substitutes is not curtailed will be a fair revenue producer. As between the two possibilities we would prefer a reduction of the use of butter substitutes. If this is the result the dairy interests may well afford to pay the tax in some other way."

The Director of Taxation expressed an identical motive as also did the Governor who, in addressing the legislature, said:

> "I earnestly recommend to you serious consideration of the report by the volunteer Tax Conference * * * this conference has recommended the adoption of * * * a tax * * * on butter substitutes * * *."

And the defendants here are impressed with the same economic philosophy for they bring into this case an admission which may not be disregarded when instead of relying on the phraseology of the legislative act in question, allege that the act was enacted:

> "For the purpose of equalizing to some extent the tax burden, as between the dairy farmer and the oleomargarine and so-called butter substitute industry; that the oleomargarine and butter substitute industry is in direct competition with the dairy farmer (and) that oleomargarine and butter substitutes can be produced at a cost of thirty five per cent to fifty five per cent of the cost of butter."

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The defendants do not amplify their contention by explaining how the act was designed to equalize the tax burden between the dairy farmer and the margarine manufacturer. They do not say that it is by restricting the sale of margarine and thereby eliminating, or at least materially decreasing competition, for the producers of butterfat. Nor on the other hand do defendants claim that the purpose of the law was to reduce the taxes of the dairy farmer. It should be noted that it is the *tax burden* which defendants say the law was designed to equalize. Not the taxes. The tax paid is quite a different thing from the burden of taxation. A tax of large amount levied on one receiving a large income from a given property may be in no way burdensome while a small tax exacted from the owner of the same kind and amount of property, but with an insufficient income, may be a heavy burden. A material increase in the price of a commodity produced by, with or on the taxable property, amounts to a lessening of the tax burden of the owner even tho the tax collected remains the same. As applied to the situation in this case if any tax is collected on margarine sales the owner- of all other taxable property whether dairy farmers or not, are theoretically relieved of a corresponding tax burden, but this burden so relieved is the burden of all taxpayers and not alone the dairy farmer. Grain farmers, cattle and hog farmers, poultry raisers, horse breeders and, as well, home owners, laborers and all others owning property or paying any form of tax may conceivably enjoy lower taxes as the result of the collection of a tax on the sale of butter substitutes. To the extent of the tax paid on such margarine the tax burden of all taxpayers is equalized with the burden which this act places upon those connected with the production, sale and consumption of margarine with special emphasis on the consumer thereof, who is actually the only one to whom the tax is a burden, but of course this is wholly theoretical. In actuality no tax may be actually collected from the sale of margarine, or if collected may be in an amount so negligible that the saving to other taxpayers may not be measured or computed in terms of money. Parenthetically it may be stated that this is true of the revenue which the margarine sales tax produced in South Dakota. The evidence shows that for the

fiscal year ending June 30th, 1930, before Chap. 258 became a law, there were 1736 retail outlets for margarine in this state; that following the passage of this law and by June 30th thereafter, or in other words three and one-half months after the law became effective, there remained but 773 such outlets. In 1932 there were 553, in 1933 there were 189 and by 1934 there were none. In 1935 there were 64 and in 1936 there were 31. The number increased in 1943 to 218 and by 1944 there were 418 of such retail outlets. The decrease in number of retailers was probably due in part to the fact that from 1933 until 1942 the United States government was distributing natural butter as a surplus commodity under its relief program. During this entire period revenue from the sales tax varied with the years. From the period from July 1st, 1944, to April 1st, 1945, it was approximately $75,000.00.

Whatever the proceeds of such sales tax may be it goes into the general fund of the state and contributes to the expense of government. But altho it may replace a tax levied directly on tangible property in the state including that owned by butterfat producers, it is not a fact that this sales tax can be said to equalize the tax burden between the dairy farmer and the margarine producer, which defendants say was the purpose and intent of the law. As a matter of fact the act imposes no tax whatever on the producer of margarine nor on any one connected with that commodity, except the eventual consumer who pays the tax as an addition to the price of the margarine and the butter consumer who pays a correspondingly increased price. The actual burden and the only one placed upon the producer of margarine is the handicap suffered by the inducement which the act may offer the consumer to buy butter in preference to the substitute. But the defendants say the purpose of the law was to equalize the tax burden between the dairy farmer and the margarine manufacturer and, as plaintiff seems to cheerfully agree, I must assume as a fact that such is the case and being so that the law was not designed as a revenue measure, but as a subsidy granted by the state to the dairy industry to lessen the competition of margarine and thus increase the price of butterfats and, incidentally, of butter. That was clearly the intention of

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the Tax Conference, the Director of the Division of Taxation and of Governor Green. Supported by the construction placed thereon in his answer the state, thru its Director of the Division of Licensing the conclusion is irresistible that the act under consideration is not a tax or revenue measure.

Conceding for the purpose of this case that the state thru its legislature is legally empowered to tax butter substitutes for revenue purposes and that a classification thereof separately from dairy butter is reasonable and valid, we are confronted with the fact that this act, altho disguised as a revenue measure, is something entirely different. Nor is it a regulatory measure adopted in the exercise of the police powers of the state. The manufacture, sale, transportation and use of butter substitutes are subject to regulation to safeguard the health and welfare of the people. If it were a regulatory measure the legislature would have the power to impose such license and inspection fees as are necessary to effectuate such regulation. Such regulatory power both as to butter and butter substitutes was previously exercised by the legislature in SDC 22.05 which defines both butter and butter substitutes and establishes definite standards for the manufacture of each. While not particularly germane to this controversy I think it proper at this point to note the distinction made by Chap. 22.05 between these two products. Butter is defined as:

> "A clean, non-rancid product made from the fat of milk or cream into a mass, together with other milk constituents and contains not less than eighty per cent of milk fat and may also contain added vegetable coloring matter,

Substitute for butter means:

> "All fatty food substances manufactured or prepared in imitation or semblance of butter • • • consisting of any edible fats, oils or oleagenous substance, with or without water or milk or milk product and with or without the addition of milk fat or whole butter and with or without salt."

From the foregoing it appears that under the statutory standards established for the two products butter must contain eighty per cent of milk fat with the rest consisting of some milk constituent, while a similar commodity made from 99.99 per cent whole butter or milk fat and 1/100ths per cent of edible fats or oils other than milk fat, is defined as a butter substitute. It will also be noted that while the addition of the slightest trace of edible fat other than milk fat renders the product a butter substitute rather than butter, the addition of vegetable coloring matter to butter is permitted, altho forbidden as to butter substitutes.

In numerous decisions the Courts have held that a differential in classification between dairy butter and butter substitutes for tax purposes is valid. McCray *v.* United States, 195 U. S. 27, 49 L. Ed. 78; Hammond Packing Co. *v.* Montana, 233 U. S. 331, 58 L. Ed. 985; Caroline Products Co. *v.* United States, 89 L. Ed. — advance opinions No. 1, page 13. But none of these decisions were concerned with or considered margarine as a product such as our statute defines. We must assume in this case that the product here alluded to contains but a discernible trace of vegetable fat.

Probably so-called butter substitutes vary in content. Likewise it is doubtful if any of them contain as much as 99.99 per cent natural butter. The fact remains, however, that a product containing that percentage of natural butter, but with 1/100ths per cent vegetable fat would still be a butter substitute. The statute under consideration treats all substitutes alike. The slightest content of vegetable fat is, under Chap. 258 as a matter of law, the basis for a separate classification for revenue purposes. I am persuaded that factually there is no substance to the difference between butter and butter substitutes in this state, or perhaps more accurately stated, there may or may not be any substantial difference. To classify them generically and without regard to actual content and to tax one and not the other is to tax the name instead of the product and is violative of Art. VI, Sec. 17 of our Constitution. The same absence of any reasonable difference or distinction between them likewise renders any tax on the substitute which does not reach the butter, violative of both the 14th Amendment to the Federal Constitution and of Secs. 1 and 2 of Art. VI

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of our State Constitution. The effect of this impost, regardless of what the legislature may have intended it to be, is to establish a protective tariff for the benefit of those interested financially in the manufacture and sale of butter to their great advantage, but to the hurt of those equally concerned in the manufacture and sale of the substitute, to say nothing of its effect on those persons who because of economic and financial necessity or personal preference, desire to eat butter substitutes, but who in order to do so must pay a ten cent tariff to producers of butter.

The Act involved so far as pertaining to this case is as follows:

> "• • • There is hereby levied and assessed • • • a tax of ten cents upon each pound of butter substitute sold • • • to consumers to be paid prior to or at the time of sale and delivery to the consumer. Before any package containing such substitute • • • is • • • offered or exposed or kept for sale in open cartons or removed from such cartons, each package shall have securely affixed thereto suitable • • • stamps denoting the tax thereon."

The Act further provides that the stamps shall be sold and furnished by the State Treasurer and that "such stamps shall be properly affixed and cancelled *prior to such display or removal* (from the carton) for consumption". The operation of the act is not limited to those pursuing the occupation of retail dealers.

Let us analyze this Act. The title is "An Act Imposing a Tax on the Sale of Substitutes for Butter". The body of the Act, however, provides that the tax must be paid "prior to or at the time of sale". Not in any case after the sale has been made. The exact phraseology is "there is hereby levied a tax of ten cents upon each pound". Altho in the statutory terminology the tax is said to be upon the commodity the time of payment is when the same is removed from the shipping carton. Until then the tax is not due or collectible. But if removed from the carton it is due and must be paid. In fact the mechanics of payment require that it actually be made to the state in advance of

opening the carton as the stamps evidencing payment must be purchased at Pierre from the State Treasurer before the carton is opened. A peculiar and distinguishing characteristic of the Act is that payment of the poundage levy must be made in advance of sale. The Act refers to a consumer, but there is actually no consumer in the picture until after the tax has been paid. The law does not require the consumer to pay the tax either originally or as a repayment to the dealer and, of course, he cannot originally pay it because when he is first permitted to see it on the dealer's shelf the tax is already paid. In fact it was paid to the State Treasurer at Pierre before the commodity was removed from the shipping container in which it was received.

What then has the legislature created by this Act? Except for the avowal of the pleadings that it was designed to equalize the tax burden between producers of dairy butter and the manufacturers of margarine and the evidence in support thereof hereinbefore mentioned, we have no evidence except the act itself. The logical answer seems to be that as applicable to retail dealers it is and claims to be nothing more nor less than a requirement that before selling or offering for sale any butter substitute or engaging in the business of selling it the dealer must pay to the state a fee in the nature of a license to do business, which license shall be in an amount equal to ten cents per pound on all butter substitute he intends to offer for sale. As applied to sellers who are not following the occupation of retail dealers the requirement is the same for a casual sale. The Court must and will take judicial notice that dealers living in the four corners of the state may be two days removed by mail communication from the capital at Pierre where the State Treasurer has his office and offers these stamps for sale and that as much as four days could elapse between the transmission of the purchase price of the stamps and their receipt by the dealer during which time his money would be invested in the stamps. Any person desiring to engage in selling margarine at retail is obliged to keep on hand at all times a stock of stamps proportionate to his probable sales. The amount necessary for him to keep invested in such stamps depends first, on his probable daily sales, and, second, the distance to Pierre. The act is

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definitely not an ad valorem tax for the reasons before mentioned, so it must be either a license fee or an occupational tax. The distinction between these forms of levy will be later discussed. Let us first proceed with the identification of the act. When Chap. 258 Laws of 1931 was adopted we had in this state nothing which might be called a general sales tax. The 1931 legislature selected butter substitutes and lard substitutes for primary attention. Four years later the 1935 legislature passed statutes which comprised what we will hereafter speak of as the General Sales Tax now Chaps. SDC 57.31, 57.32, 57.33 and 57.34. This general sales tax and accompanying retail license fee has, I think, some bearing on the margarine tax legislation. The scheme here set up is that every retail storekeeper must pay to the state an annual license fee of $1.00 with a graduated increase for any additional stores over one operated by him (SDC 57.34). Having paid this license fee he must then pay what the legislature was pleased to term a "tax upon the privilege of engaging in the business as a retailer" (SDC 57.3201). This section fixes this so-called tax upon privilege as a "tax of 2% upon the gross receipts from all sales of tangible personal property • • • sold at retail in the State of South Dakota to consumers or users". Certain exemptions from the computation of this tax are provided in SDC 57.3202 among which are the proceeds of the sale of butter substitutes. SDC 57.3302 requires the retailer to report on or before the 15th of each month the amount of his sales for the preceding month and to then remit the tax due as based on such report. We are not here concerned with the constitutionality of this revenue measure as it is not operative as to butter substitutes. It is, however, interesting in its differentiation between sales of margarine on the one hand and all other commodities on the other, but I allude to it principally because the legislature has labeled it not as a sales tax but as what it is i.e., an impost on the privilege of engaging in business as a retailer. It is not therein called a license, but a tax. The word license having been reserved for the one dollar fee required before the establishment might be "opened" or "commenced". Obviously it is called a tax on the occupation of retailing because our State Constitution Art. XI

Sec. 2 authorizes the legislature to impose taxes on "incomes" and "occupations". Whatever it may be called it is to be paid by the purchaser in the first instance since SDC 57.3304 empowers him to "add the tax imposed under this particular act or the average equivalent thereof, to the sales price or charge". The dealer's liability is simply to collect the sales tax when the sale is made and to remit it to the state.

To now advert to the topic under discussion, this general sales tax law by its phraseology is in effect a legislative definition and interpretation of the margarine tax law and impels the conclusion that Chap. 258 Laws of 1931 is likewise a licensing act as to butter substitute dealers requiring a license fee to engage in the business of selling butter substitutes just as the general sales tax statute requires a license in retailing other products. There is, however, much difference in the operation of the two statutes. Chap. 258 requires the license to be paid in advance while the general sales tax law merely requires collection of the tax from the consumer and remittance to the state within thirty days thereafter, but this I consider represents a very substantial difference between the two acts and this difference is all in favor of construing the margarine law as a license statute.

The conclusion then is inescapable that the legislature has made a classification of retail dealers. In one separate class are those who sell butter substitutes and in the other those who sell at retail other products. The retailer of butter substitutes pays a poundage tax of ten cents for his right to carry on his occupation. With the substitute selling at 25¢ per pound this would represent a tax of 49%. At ten cents per pound selling price it would be at the rate of 100%. Other retailers pay a fixed rate of 2% of the sales price. To keep our thinking straight we must recognize the possibility that one retailer may sell nothing but butter substitutes while in the next building another retailer may sell every other commodity except butter substitutes and other commodities exempted from the operation of the general sales tax law. We then have a situation where two licensed dealers operate under two separate license statutes.

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There are two theories on which a retail merchant may be compelled to contribute to the state beyond his ad valorem and income tax. One is thru an occupational tax levied under constitutional authority permitting a tax on incomes and occupations. The other is under the police power as a license to engage in an occupation within the scope of police regulation. In the latter category falls the practice of the learned professions as well as other vocations attended with peculiar public interest. A tax on an occupation is levied for revenue and nothing else and has nothing to do with the exercise or police powers by the one following the occupation, the retail occupational sales tax so-called is that and nothing more for it in no way regulates the conduct of the retailing business and no police power is asserted. What then is Chap. 258, the Act in question? It too may produce a revenue. It too makes no attempt to regulate the retailer, his method of storing, exposing for sale or selling his merchandise or the merchandise retailed. It does not create an ad valorem tax for no tax is due on the substitute itself, but only on the offer to sell it. It is therefore either a license fee or an occupational tax. If the former it is invalid because not required in expression or in exercise of the police power. If the latter it makes and recognizes a distinction for purely revenue purposes between retailers based on nothing more than the article sold by them. Butter substitute is a wholesome, nutritious article of food, the manufacture of which, as before noted, is regulated in this state and also by the Federal Government under the police power. Surely there is no legal basis for breaking down retailers in this state into two classes for purposes of occupational taxation. If the legislature may do this the possibilities of a complex occupational tax system are unlimited. Such a classification between retailers in the different lines of trade such as lumber, furniture, automobiles, hardwood, groceries, clothing, trucks or agricultural implements would be without logical premise, but to further break down these occupations to divide the occupation of selling groceries into subclasses of green grocers and dry groceries, then to divide dry groceries into vendors of crackers or vendors of salt, to divide furniture dealers into classes as sellers of Duncan-

Phyfe or dealers in Hepplewhite or dealers in veneered Grand Rapids models, to divide automobile dealers into Ford dealers and Buick dealers would be so unreasonable as to exceed all constitutional authority. With such an impossible sub-classification varying taxes could be arranged to accomplish not only the super-collection of revenue for the state, but to effect a distribution of retail effort according to the best and most advanced thought in artificially controlled economics.

To prolong this analysis can add nothing to the point involved. A retail merchant is a retail merchant and all retail merchants should be dealt with alike for purposes of occupational tax without regard to what they sell, assuming of course, that no occasion exists to apply the police power.

A statute taxing margarine in the State of Washington was upheld by the United States Supreme Court in the case of Magnano *v.* Hamilton (1934) 292 U. S. 40, 78 L. Ed. 1109, which was a suit to enjoin the enforcement of the statute on the ground that it violated the Federal Constitution in certain particulars. The Court put aside all contentions except the one relating to due process of law, saying that they were plainly without merit. As to whether violative of the due process clause, the Court said that such clause is, except in rare and special instances, not a limitation upon the taxing power conferred upon Congress by the Constitution and that no reason exists for applying a different rule against a state in the case of the 14th Amendment. In reference to the Washington statute the Court further said:

> "The clause is applicable to a *taxing* statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect the direct exertion of a different and forbidden power as, for example, the confiscation of property."

The Court further said:

> "Unless the necessary interpretation and effect of a statute be such as plainly to demonstrate that the

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form of taxation so adopted is a mere disguise under which there was exercised in reality another and different power denied by the Federal Constitution to the state, a tax within the lawful power of a state may not be judicially stricken down under the due process clause. The present case does not furnish such a demonstration * * * the statute here in review is in form plainly a taxing act with nothing in its terms to suggest that it was intended to be anything else * * * if a contrary conclusion were reached in the present case it could rest on nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which standing alone this Court heretofore has uniformly rejected as furnishing no judicial ground for striking down a taxing act."

It is obvious that the Washington statute was sustained on the broad ground that it was a taxing act. From the opinion it appears that the form of the Washington statute was dissimilar to ours. That is the point of difference between the Magnano case and the one at bar. Here we are dealing with an act which is not in the form of a taxing act. The Magnano case is relied upon by the defendants with much confidence as being decisive of the legality of Chap. 258 Laws of 1931, but I decline to share their enthusiasm for the reasons before expressed, that the presumption arising from the form of the statute that it is a taxing act does not lie in this case. Secondly, while the United States Supreme Court is bound by the precedent of a long and uninterrupted line of decisions beginning with the case of Veazy Bank *v.* Fenno, 8 Wall. 533, 19 L. Ed. 482, these decisions are not binding on the courts of this state. Insofar as concerns the Federal Constitution they are, but they are not restrictive as to the interpretation by the courts of this state of Sec. 1 and 2 of Art. VI, S. D. Const. The doctrine expressed in the Veazy Bank case, supra, and later followed in McCray *v.* United States, 195 U. S. 27, 49 L. Ed. 78, 24 S. Ct. Rep. 769, 1 Ann. Cas. 561, which incidentally was one having to do with the validity of a tax on oleomargarine;

the case of Flint *v.* Stone-Tracy Co., 220 U. S. 107, 55 L. Ed. 389, 31 S. Ct. Rep. 342, Ann. Cas. 1912B 1312 and United States *v.* Doremus, 249 U. S. 86, 63 L. Ed. 493, 39 S. Ct. Rep. 214, held that where the act is on its face a taxing measure and nothing more it must be sustained notwithstanding the suspicion arising from extraneous circumstances that some other purpose was intended by the legislature than the mere raising of revenue. An interesting and instructive discussion of the foregoing cases was made by Mr. Chief Justice Taft who delivered the opinion of the Court in the case of Bailey *v.* Drexel Furniture Co., 259 U. S. 20, 66 L. Ed. 817, 42 S. Ct. Rep. 449, 21 A. L. R. 1432, otherwise known as the Child Labor case. Congress has passed a statute imposing a tax of ten per cent on the net profits of the year upon any employer who knowingly has employed during the taxable year any child within the age limits therein fixed. The Court held that this was not a valid exercise by Congress of its powers of taxation under the Federal Constitution but was an unconstitutional regulation by the use of the so-called tax as a penalty for the employment of child labor which under the Tenth Amendment to the Federal Constitution is exclusively a state function. In the opinion Chief Justice Taft said:

> "In the light of the features of the Act a Court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it? It is the high duty and function of this Court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even tho it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the

Arc of our Covenant or the harm which will come from breaking down recognized standards * * * Out of a proper respect for the acts of a coordinate branch of the government this Court has gone far to sustain taxing acts as such. Even tho there has been ground for suspecting from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law and all that Congress would need to do hereafter in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with * * * would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

In the Child Labor case the act was held unconstitutional because the evidence of its illegality seemed to be deducible from the fact of the act itself. In the case at bar the evidence of unlawful legislative purpose does not appear on the face of the act as fully as it is disclosed in the defendants' answer, but it does conclusively appear from the act itself that it is not a tax on butter substitutes, so we cannot apply the rule laid down in the Magnano case and which the Court expressed by saying:

> "If the tax imposed had been five cents instead of fifteen cents no one would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had been exercised."

Perhaps such reasoning was sound in the Magnano case because there was apparently no evidence other than the amount of the tax to cast doubt on the legislative intent, but surely the rule is not so inflexible that the amount of the

tax could always be disregarded as evidence of the legislative intent. Conceding for the purpose of argument that a tax of fifteen cents is not prima facie evidence of an intent to accomplish a forbidden purpose by the legislature. What then of fifty cents or a dollar or five dollars or fifty dollars? Should not such an amount of tax tell its own story of wrongful legislative purpose? But this is academic. The question on the one hand is whether evidence de hors the act itself may not be considered in any case where the act is a taxing measure and the size of the tax evidentiary of the unlawful purpose and design attending its passage. I resolve this uncertainty by holding that if it appears either on the face of the act, or by convincing evidence of unlawful purpose shown extraneously, or as in this case by admission in the pleading, it is within the power of state courts to invalidate the legislative act.

In the Veazy case, McCray *v.* United States, Flint *v.* Stone-Tracy Co., United States *v.* Doremus, all supra, the United States Supreme Court was not concerned with any exercise of forbidden power by the legislative branch of government, but only with the effect of the legislative acts upon individuals. In the McCray case the Court said that argument rested upon the proposition:

> "That altho the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority."

In construing this pronouncement in the Magnano case the Court said:

> "And it was held that if a tax be within the lawful power of the legislature the exertion of the power may not be restrained because the results to arise from its exercise."

But the Supreme Court has never recognized any limitation on its power to strike down a taxing act where the tax or license required by legislative act either directly or indirectly impinged on a power forbidden by the Federal Constitution.

In the case of Grosjean *v.* American Press Co. (1936), 297 U. S. 234, 56 S. Ct. Rep. 444, was considered a Louisiana statute imposing a license tax of 2% of gross receipts on the privilege of engaging in selling advertising. This law was assailed as invading the freedom of the press and the equal protection of the laws. The Court held it invalid, and said:

> "Its effect is to curtail the amount of revenue realized from advertising, and its direct tendency is to restrict circulation. This is plain enough when we consider that if it were increased to a high degree, as it could be if valid (Magnano *v.* Hamilton) it well might result in destroying both advertising and circulation"

and further:

> "The form in which the tax is imposed is in itself suspicious. It is not limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."

The Court took judicial notice of the history of the struggle for freedom of speech and of the press. The Court here went beyond the statute itself to find its invalidity notwithstanding it was on its face an exercise of taxing power only.

In Stewart Drygoods Co. *v.* Lewis, 294 U. S. 550, 74 L. Ed. 1054, the Court was considering the constitutionality of a graduated gross sales tax law of the State of Kentucky which it held violative of the 14th Amendment. This case is applicable in many respects to the case at bar. The Court said:

> "In resolving the issue we are not concluded by the name or description of the tax as found in the act. Our

duty is to ascertain its nature and effect. 'The substance and not the shadow determines the validity of the exercise of the power'. The act does not impose an income or profits tax, or a license tax, is not an inspection measure or a police regulation. The tax is not confined to a particular method of merchandising • • • And the excise is laid in respect of the same activity of each of them—the making of a sale."

In U. S. *v.* Constantine, 296 U. S. 287, 56 S. Ct. Rep. 223, in holding invalid a statute imposing a special tax on selling intoxicating liquor in violation of local statutes, the Court said:

"In the acts, the item is variously denominated an occupation tax, an excise tax and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation regardless of name. Disregarding the designation of the exaction and viewing its substance and application, we hold that it is a penalty for the violation of State law and as such beyond the limits of federal power."

In Hill *v.* Wallace, 259 U. S. 44, 66 L. Ed. 823, the validity of a Federal Statute known as the Future Trading Act was under consideration. This act on its face is a complete regulation of boards of trade with a tax of twenty cents a bushel on contracts for the sale of grain for future delivery. It was held not to be a valid exercise of the taxing power of Congress because invading powers reserved to the states.

See also: Mugler *v.* Kansas, 123 U. S. 623, 81 L. Ed. 205; Henderson *v.* Mayor of New York, 92 U. S. 259, 23 L. Ed. 543.

But in the case at bar we are not concerned simply and alone with the effect of this controversial legislation on the individuals connected with the butter substitute industry, altho quite certainly it is that injury of which the plaintiff complains. As disclosed by the evidence in this case the act is an economic measure intended and designed to destroy the margarine industry and establish dairy butter as a monopoly. To be sure it will at least theoretically, produce

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a revenue to the state as long as any margarine is produced and sold in the state, but this revenue is dependent on sale as sale is dependent upon manufacture. Production or manufacture will be in direct ratio to demand and consumption and consumption will depend on price. The price of butter substitutes will in turn be governed by the price of natural butter and the price of the latter will be advanced by any subsidy established by this act. Practically considered the state's revenue from the tax provided by this act will eventually be nothing. The question for decision then is not whether the legislature is empowered to augment the revenues of the state by a tax on butter substitutes. Concededly it is so empowered as it is likewise empowered to tax any other property and the sales thereof. The question rather is whether it may set up a subsidy for the benefit of one industry or business by the destruction of a competing one.

Art. XVII Sec. 20 of our State Constitution was adopted by a direct vote of the people in 1896 by the decisive vote of 36,763 to 9136. At this time most of the taxing powers given to the legislature had already vested. The amendment reads as follows:

> "Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, thru their stockholders or the trustees or assigns of such stockholders, or with any co-partnership or association of persons, or in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor.
>
> "The legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises."

From the phraseology of this provision it seems evident that the monopoly or trust which the people feared and sought to prevent was one created by individuals to *fix the price, limit the production or regulate the transportation* of any product or commodity so as to prevent competition in such price, production or transportation or to establish an excessive price therefor.

It is doubtful if the people invisioned the creation of any monopoly by the legislature itself for it was the legislation which in its 1895 session enacted the section in its present form and caused it to be submitted to popular vote and it was the legislature which was commended to pass laws for the carrying out of this constitutional mandate as evidenced by the concluding paragraph of the section. The thing which the people required was that *"monopolies and trusts shall never be allowed in this state"*. The balance of the section forbids certain specific combinations and contracts creating monopolies and trusts, but clearly any monopoly or trust however created is forbidden, or, as the Constitution reads "shall never be allowed in this state." The act is at the same time a declaration of public policy and a limitation on legislative policy. A monopoly set up by legislative act is as much a monopoly and equally as forbidden as one resulting from the unlawful combination and contract of corporations or other associations of persons and it is as detrimental and sinister and effective to fix prices, limit production and prevent competition as tho done by individuals. It was an association of individuals which composed the legislature and I see no greater power existing in those individuals to effect a monopoly than any other group of individuals. Webster defines a monopoly as the exclusive power, right or privilege of selling a commodity.

The Courts have variously defined monopolies. See Love *v.* Kozy Theater Co. (Ky) 236 S. W. 243, 26 A.L.R. 264; Cases cited in 36 Am. Jur. pp. 479-480.

The principal evils which lead to public outcry against monopolies and to the final denial of the right to make them was the power which the monopoly gave to the one who enjoyed it to fix prices and thereby injure the public; the power which it engendered of enabling a limitation on production; the danger of deterioration in the quality of

the monopolized article, which it was deemed was the inevitable resultant of monopolistic control over its production and sale. Monopolies were also thought to tend towards the impoverishment of labor, 36 Am. Jur. 481.

In the famous "Case of the Monopolies" Sir Edward Coke declared that a grant from the crown of a monopoly was void at common law as being incompatible with the English Constitution, Standard Oil Co. *v.* United States, 221 U. S. 1, 55 L. Ed. 619, 31 S. Ct. Rep. 502, 35 L.R.A. (NS) 834, Ann. Cas. 1912D 734.

In the absence of our constitutional provision Sec. 20 of Art. XVII, it would seem that the state might without violating either the 5th or the 14th Amendments to the Federal Constitution, fix prices on commodities charged with a public interest and that milk and butterfat would be commodities recognized as being charged with public interest. The contrary was held in 1929 by the United States Supreme Court in Williams *v.* Standard Oil Co. (La), 278 U. S. 235, L. Ed. 141, 49 S. Ct. Rep. 115, 60 A.L.R. 596, where it was held that a statute of Louisiana fixing prices on gasoline was violative of the 14th Amendment to the Federal Constitution, but in the later case of Nebbia *v.* New York decided in 1934 and reported in 78 L. Ed. 940, 291 U. S. 502, 89 A.L.R. 1469, the Court sustained an act of the New York legislature fixing the price of milk against the claim that it violated the 5th and 14th Amendments of the Federal Constitution. The Court was dealing only with the Federal question. Not with any claimed limitation on the power of the New York legislature by reason of the State Constitution. It was a five to four decision. Justices McReynolds, Van deVanter, Sutherland and Butler vigorously dissented. The position of the Court was expressed by Justice Roberts in the majority opinion, who said:

> "So far as the requirement of due process is concerned and *in the absence of other constitutional restriction* a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adapted to its purpose. The Courts are without authority either to declare such policy, or, when it is declared by the legis-

lative arm, to overrule it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory the requirements of due process are satisfied and judicial determination to that effect renders a Court 'functus officio'.

"Whether a free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this Court need not consider or determine • • • The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process".

This, of course, brings us in direct collision with Art. XVII Sec. 20 of our Constitution. It is the constitutional restriction which the people of this state have imposed on the activities of its legislature which Justice Roberts recognizes as a limitation on its power to interfere with the natural economic laws of supply and demand. It is not only a declaration by the people of a policy opposed to price fixing by individual groups in their own interest, but is equally a withdrawal of any power in the legislature to indulge in any experiment of price fixing. The people's mandate to the legislature was to pass laws to prevent the fixing of prices, or the limitation of production of any product or commodity so as to prevent competition or establish excessive prices thereon. Inversely, it likewise forbade the legislature enacting any law which had the opposite effect. The wisdom of the adoption of this policy is as Justice Roberts said in the Nebbia case, not for the Court's determination. I say it is not for the legislature to determine. The people spoke in 1896 and their voice was the voice of authority.

The importance of the question cannot, however, be overestimated. The Nebbia case has removed all the federal restraints long thought to exist to the exercise by the legis-

lature at least of the power to adjust or regulate the price of commodities and products which are the subject of private consumption and trade; and this, I think, regardless of any question of public interest or supposed economic emergency. I refer to the 5th and 14th Amendments to the Federal Constitution and Secs. 1 and 2 of Art VI of our State Constitution and here I desire to interpolate the opinion that the Nebbia case and the conclusion there arrived at that price fixing legislation does not violate the 5th and 14th Amendments to the Federal Constitution is not decisive of whether it violates the 1st and 2nd sections of Art. 6 of our State Constitution. That is a matter for the determination of the state courts and the question is still an open one in this state. For the purpose of this opinion I hold that without reference to our constitutional provisions on monopolies and trusts this act, because not being clothed with the sanctity and authority of a revenue measure, deprives those interested commercially in the production and sale of margarine, of their property without due process of law and as to them and as to the consumers of butter substitutes deprives them of their liberty and freedom of action to select and use without legislative interference a pure, wholesome and nutritious food. These constitutional provisions are apparently the only anchor to restrain the legislature of this state from setting its course on the economic sea in search of the fabled isle of economic perfection where the sinister laws of supply and demand have all been repealed and the idealism of artificial controls inaugurated in their stead. Untrammeled by all restraints and having successfully raised the price of butterfat for the dairy farmers by destroying all substitutes, except for our state constitution we might expect a tax on cotton goods for the benefit of the wool growers of the state, on articles of silver to aid the gold miners, on coal to develop a market for our native lignite, on maple sugar to raise the price of beet sugar and on lumber to create a monopoly in cement, of which the state is a large producer. The effect of such legislation would undoubtedly be to raise the price of the favored commodities to the consumer living in this state since such consumer who buys the substitute commodity would pay as much more for it as the amount of the subsidy created by

the tax, but it seems unlikely that the citizen who produced the commodity so favored by the legislature would realize any advantage since the greater part of his product would be exported from the state to a competitive market and the protection would not go with it. The burden of this supposed economic boom envisioned by the legislature would fall on the retailer living in the state whose customers were buying outside the state as do now the buyers of butter substitutes. It is equally certain that if in retaliation other states established similar subsidies for their home industries any imagined advantage to the South Dakota producer would be more than nullified. The consumer would pay the bill.

Most of what I have had to say up to this juncture has had to do with the effect on the producer of butterfat and on those engaged commercially in the manufacture, sale and distribution of butter and butter substitutes. The attempt to subsidize the dairy industry of this state, which is evidenced here, has diminished the demand for butter substitutes and thus worked an injury and loss of profits to the plaintiff and those similarly engaged in business. There still remains to be considered the one most interested and affected by this statute, the consumer, who either thru necessity or preference, uses butter substitutes. He is the forgotten man in this economic struggle between opposed commercial interests. Unless he eats his bread as it is cut from the loaf he must pay ten cents a pound more than formerly for either butter or butter substitutes. If he is also a producer of either it all washes out for he regains the added cost by increased revenues from butter sales. But if he is not a dairy farmer the only certain effect of the act is an additional cost to him of ten cents per pound for whatever he spreads on his bread. In short, the farmer who raises horses or cattle or sheep or grain, the miner, the professional man and the laborer all contribute to the subsidy created by the legislature for the dairy farmer. The implement employed to accomplish this larcenous design is clothed in the mantle of a revenue measure. The wolf in Little Red Riding Hood was also disguised, but he was a wolf just the same. As Chief Justice Taft said in

the Child Labor case, supra, "all others can see and understand this. How can we properly shut our minds to it?"

The fact premise I have adopted here for this decision is in part grounded on extraneous evidence that the law in question was not intended or designed by the legislature as a revenue measure, but as a subsidy. But I would feel it my duty to arrive at the same fact conclusion in the absence of this evidence of the impelling reasons and forces behind its passage for I am convinced that in the light of the recorded judicial decisions going back at least to People *v.* Marx, 2 N. E. 29, the courts may take judicial notice that all legislation fixing a tax on butter substitutes which is not also imposed on dairy butter, is actuated by subsidy motives and such laws are not good faith revenue measures. The avalanche of judicial precedent, the language of the federal and state courts, the records of congressional committees, may not be disregarded. The duty of the courts to recognize as a fact the true character of such legislation is clearly indicated. Their duty to act is equally plain. It is, of course, with manifest reluctance that the judicial branch of government invalidates the acts of the co-ordinate legislative arm, but the danger of ill-considered legislative tampering with constitutional rights is too great and the effect thereof too appalling to justify judicial inaction. As applied to this character of legislative experimentation the rights of free men to choose their food and clothing for themselves and their families, is fundamental. It is the primary function of government to protect this right for it is a right, to which all else must yield. It is no less important than the right to liberty, freedom of worship, of speech and of the press specifically guaranteed by the Constitution and Laws of all free men.

If the act had prohibited the sale of margarine it would be invalid, People *v.* Marx (N. Y.) 2 N. E. 29, 52 Am. Rep. 34; Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156; State *v.* Wood, 51 S. D. 485, 215 N. W. 487; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858; Wick Yo *v.* Hopkins, 118 U. S. 356, 30 L. Ed. 220; John F. Jelke *v.* Emery (Wis.) 214 N. W. 369, 53 A. L. T. 463; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49; Collins *v.* New Hampshire, 171 U. S. 30, 43 L. Ed. 60; Weaver *v.* Palmer Bros. Co., 270 U. S. 402, 70

L. Ed. 655; People *v.* Biesecker (N. Y.) 61 N. E. 990; Caroline Products Co. *v.* United States, 89 L. Ed. Adv. Opinions No. 1, p. 13; Louis K. Liggett *v.* Baldridge, 278 U. S. 105, 73 L. Ed. 204; Meyer *v.* Nebraska, 262 U. S. 390, 67 L. Ed. 1042; New State Ice Co. *v.* Lieberman, 285 U. S. 262, 76 L. Ed. 747; Adams *v.* Tanner, 244 U. S. 590, 61 L. Ed. 1337; State *v.* Harris (N. C.) 6 S. E. (2d) 854, 128 A. L. R. 658.

This act does not prohibit, *but it does place a burden on the sale in the form of a license on the privilege to sell.* If it were a tax measure for revenue the fact that it burdened dealers in margarine or even destroyed the margarine industry would not render it invalid. McCulloch *v.* Maryland, 4 Wheat 316, 4 L. Ed. 579; Garrett Freight Lines *v.* Tax Commission (Utah) 135 Pac. (2d) 523; Great Northern R. R. Co. *v.* Whitfield, 65 S. D. 173, 272 N. W. 787. And see Annotation at page 776 et seq. of U. S. Sup. Ct. Reports, 81 L. Ed., on Power of Congress to exercise its taxing power to restrict or suppress the thing taxed, or to accomplish some ulterior purpose.

But it does not impose a tax on margarine so the foregoing and other decisions based on the right of the legislature to tax are not applicable. *Likewise it is not an exertion of the police power.* The case of Alaska Fish Salting and By-Products Co. *v.* Smith, 255 U. S. 44, 65 L. Ed. 489, cited as an authority by defendant sustained the right of the territorial legislature to levy license taxes of $2.00 a barrel on persons manufacturing fish oil, fertilizer and fish meal from herring. The Court said:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for man or for salmon, and *to that end* impose a greater tax * * * than upon similar use of other fish * * * it can hardly be said to be contravening a constitution that has known protective tariffs for a hundred years."

From this it is clear that the primary basis of the decision was that the legislature had the power to preserve herring and discourage its destruction which was a police power. The fish were the property of the people as wild

game is the property of the people of South Dakota. The defendant was engaged in destroying the people's fish. This the legislature could prohibit if it saw fit, as all wild game may be protected. The decision relates to the exercise of the police power rather than the taxing power. The statute we are considering exerts neither.

I recognize the right of the legislature to tax certain privileges, businesses or occupations and leave others untaxed. But the right of the legislature so to do must be in the exercise of the taxing power as conferred under Art. XI, Sec. 2 of the State Constitution. In short, it must be in an attempt to produce a revenue for the state.

The right of the Federal and State Governments in exercise of the police power has been said to be the least restricted of all powers of government, State *v.* Wood, supra.

But notwithstanding, the rule is well established that even under the broad police power a legitimate business or occupation may not be forbidden or the manufacture of a commodity absolutely prohibited where reasonable regulation is sufficient to protect the public, Weaver *v.* Palmer Bros. Co., supra, Wick Yo *v.* Hopkins, supra, State *v.* Wood, supra.

And there must be a reasonable relation between the requirements of the regulatory measure and the proper and sufficient accomplishment of the regulation. In no case may the legislature arbitrarily or captiously prohibit where regulation is adequate. This restraint on legislative prerogative applies even where absolute prohibtion is not specified if the necessary effect of the act is to unnecessarily destroy either the business or the commodity, Collins *v.* New Hampshire, supra, Weaver *v.* Palmer Bros. Co., supra.

I feel it proper to reiterate that these are limitations on the police power and not on the taxing power which when actually exercised in apparent good faith is subject to no such limitation. The principle involved is that the legislative branch of government may not invade the common right of free men to make and sell and use any article they desire without let or hindrance unnecessary for the public good. The legislative power is to regulate only—not to

prohibit, and to regulate only to the extent necessary for public protection. The multitude of authorities support this basic exposition of principle.

The legislature has not here prohibited, but it has hampered, impeded and discouraged, just as the Kentucky legislature did in the statute held invalid in Grosjean *v.* American Press Co., supra. There the publication of newspapers was not prohibited, but the Court said its tendency was to restrict the circulation of the paper. Quite certainly that is the effect of a ten cent tax on the sale of margarine. It was certain to do that. It was intended to accomplish that very thing and it had the result. The Grosjean case is ample authority in itself for the relief sought by the plaintiff in this case for the guarantee of freedom of speech and of the press does not outweigh in importance the right to eat.

The defendant relies upon the decision of our Supreme Court in State ex rel Botkin *v.* Welsh, 61 S. D. 593, 251 N. W. 189, as authority for a classification of property and occupations for tax purposes. With the general philosophy of this decision I find little to criticize. Judge Campbell, who wrote the opinion, indulged himself in a very broad discussion of the general principles relating to taxation. The question there involved was the validity of the Gross Income Tax, Chap. 184, Laws of 1933. The statute was sustained as a tax and revenue measure, but held invalid as to receipts of the taxpayer not incident to his engagement in a business, pursuit, profession, trade, vocation or calling. It affirms the proposition that a tax upon an occupation is equivalent to a tax upon the privilege of engaging therein. And it sustains the right to tax the occupation of retail selling. But the entire decision is predicated upon the premise that it is:

> "An exercise of the taxing power of the state as a district from separate from the police power, and an exercise of the taxing power *for purposes of revenue only, and not for business control.*"

This decision does not bear on the case at bar because of its treatment of the distinction between the *business* or *occupation* of retail selling and an isolated or casual sale

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of a commodity or article owned by the seller. This distinction is important. Prefacetory to its discussion permit me to say that Chap. 258 does not confine the burden of privilege taxation to persons engaged in the business or occupation of selling butter substitutes, but requires payment of its levy by any person making a sale of butter substitutes. Thus it applies to the sale by an individual who has no business place and is distinctly and definitely not engaged in retail trade, but who has come into the possession and ownership of a carton of margarine which he desires to sell and dispose of. By the terms of the act he must affix stamps to it before effecting its sale or even offering it for sale. Judge Campbell in Botkin *v.* Welsh, supra, considers this situation in the light of the gross sales tax which is admittedly a tax statute, and says:

> "The Courts have therefore said that it is not permissible by any fiction of privilege to tax in fact the mere right of ownership of property or the legal incidents thereof • • • A necessary incident of ownership is absolute dominion over the property and the right of the owner 'to use it or dispose of it or dispose of it according to his pleasure subject only to general laws'. To tax the owner of property for engaging in the business of selling his property approaches closely to the permissible line. To tax the owner upon the privilege of selling or renting his property per se passes beyond the line. The distinction may seem tenuous but it is nevertheless discernible. In the one case you have both the elements of an owner dealing with his property and the element of engaging in a business or occupation of such dealing • • • the element of being engaged in the business, occupation, trade, vocation or calling of making such dealings is essential to validate the concept of a taxable privilege."

I have tried to approach this statute from every possible angle. The application of the great body of case law to the statute has been rendered more difficult by the hybrid character of the act itself. It is neither fish nor fowl. Its character as a monopolistic subsidy is to some extent de-

pendent on the pleadings and the extraneous evidence of the motive impelling its passage, *but even without such pleadings or evidence its vulnerability to attack may be found in the statute itself.* It typifies an attempt at legislative interference with basic human rights which has pervaded Congress and most of the legislatures for many years. It is the product of government by organized minorities. The question of general policy involved in this character of legislation is, as was so recently said by the United States Supreme Court in Caroline Products Co. *v.* United States, supra, "a question of fact and of public policy which belongs to the legislative department to determine."

But when the legislature has spoken it is for the Courts to determine whether the act passed constitutes in its adopted form the exercise of a valid, as distinguished from a forbidden power. It is the form of the statute passed as Chap. 258, Laws of 1931, with which we are concerned here, and not the right to adopt some other form of statute which must be here decided.

It is impossible to reconcile the case law which has to do with the propriety of judicial restraint of legislative exercise of the police power. The Caroline Products case, supra, is illustrative. There the Court attempts to distinguish, Weaver *v.* Palmer Bros., supra. It chooses to adopt the doctrine earlier laid down in Powell *v.* Pennsylvania, 127 U. S. 678, 32 L. Ed. 253, which gives the broadest powers to the exercise of police powers by Congress. In Powell *v.* Pennsylvania, Justice Field wrote a dissenting opinion which expresses my own philosophy better than I can voice it. These three cases last mentioned are important ones covering a period of some 57 years of disharmony of the Courts as to the scope of the police powers of Congress. It is too much to expect of the state Courts that they should agree on the police powers of state Legislatures. Their decisions, like those of the United States Supreme Court largely reflect the personal attitudes of the men who compose those courts.

The act is unconstitutional:

1. Because as admitted by the pleadings it was not designed as a revenue measure, but as an economic

regulation to equalize the "tax burden" of the dairy interests, and as a subsidy for the latter, and is therefore forbidden by Constitution, Art. XVII, Sec. 20, and violates the 5th and 14th Amendments to the Federal Constitution.

2. It appears by the phraseology of the act that its application is not confined to sales by retail dealers in margarine. As to sales not made by those in the occupation of retailing it is not a permissible tax on sales of margarine under Art. XI, Sec. 2 and Art. VI, Secs. 1 and 2 of the State Constitution. It is not binding on retail dealers because not phrased as an occupational license, but is a plain attempt to tax all sales whether or not by dealers. Applicable as it is to all but void as to those not retailers it cannot be sustained as to retailers.

3. If it be construed as a tax or license on the occupation of selling margarine at retail, it makes no reasonable distinction between retailers of margarine and retailers of other commodities and there is no legislative power to make such a sub-classification of retailers. And for this reason also it violates S. D. Constitution Art. XI, Sec. 2 and Art. VI, Sec. 1, 2 and 17.

4. It is not an ad valorem tax on butter substitutes and thus the distinction, if any might be made, between natural dairy butter and butter substitutes is unwarranted and violates Constitution Art. XI, Sec. 2 and Art. VI, Sec. 17, requiring uniformity of taxation.

5. A distinction between butter and butter substitutes for purposes of either taxation or regulation of the product or of the right to sell it or of the right to engage in the occupation of selling it cannot be lawfully made by the legislature since by its previous passage of statutes defining both products no reasonable or substantial difference exists in the two commodities. Any statute describing butter substitutes generically as does this statute, may not tax or regulate one and exclude the other under Art. XI, Sec. 2, and Art. VI, Sec. 17 of the State Constitution.

6. It is not a regulatory measure under the police power, but an arbitrary and unauthorized legislative meddling with a natural and inherent personal privilege of the people in violation of Constitution, Art. VI, Secs. 1 and 2.

7. Being neither an ad valorem tax, a tax on an occupation, nor a police regulation, but purporting nevertheless to inhibit the unrestricted sale of a lawful article of commerce it violates S. D. Constitution, Art. VI, Sec. 1 and 2 and also the 5th and 14th Amendments to the Federal Constitution.

For all the reasons before expressed the defendants should and will be permanently restrained from enforcing or attempting to enforce the provisions and penalties of SDC 57.40, originally Chap. 258, Laws of 1931.

(S.) R. C. BAKEWELL,
Judge of the Fourth Judicial Circuit
of the State of South Dakota.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

LEO SCHMITT, *Plaintiff and Respondent,*

vs.

ROY A. NORD, as Director of the Division of Licensing of the State of South Dakota et al., *Defendant and Appellant*

Appeal from the Circuit Court of Hanson County, South Dakota

Hon. R. C. Bakewell, Judge

Opinion Filed Jun. 23, 1947

George T. Mickelson, Attorney General; Benj. D. Mintener, Assistant Attorney General, Pierre, South Dakota, Attorneys for Defendants and Appellants.

Danforth & Bleeker, Mitchell, South Dakota; McFarland & Sellers, Washington, D. C., Attorneys for Plaintiff and Respondent.

SMITH, *Judge:*

This is an appeal from a judgment which restrains the defendants, as officers of the state, from enforcing SDC 57.40, originally enacted as Ch. 258, Laws of 1931, on the ground that the enactment is repugnant to provisions of the Federal and State Constitutions.

Sections SDC 57.4001 and 57.4003 read as follows:

> "There is levied and assessed and shall be collected and paid to the State Treasurer a tax of ten cents upon each pound of butter substitute sold in South Dakota to consumers, to be paid prior to or at the time of the sale and delivery to the consumer. Before any package containing such substitute for butter is delivered to the consumer or offered or exposed or kept for sale in open cartons or removed from such cartons, each package shall have securely affixed thereto suitable stamp

or stamps denoting the tax thereon. The display or possession by any dealer of any package, except in original unopened cartons or other containers, which do not bear the required stamp or stamps, shall constitute prima facie evidence of violation of this section. Such stamps shall be properly affixed and cancelled prior to such display or removal for consumption, under such regulations as the State Treasurer shall prescribe. When such substitutes for butter are sold by a retail dealer, to consumers in cartons or other original unopened containers, said stamps, properly cancelled, may be affixed to each such original unopened carton or container and not to each package contained therein." SDC 57.4001.

"The money received by the State Treasurer from the stamp taxes herein imposed shall be credited by the State Treasurer to the general fund of the state. From the total amount of taxes to be raised by levy against real and personal property a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this chapter, and the balance only, after such reduction has been made, shall be levied against such real and personal property. It shall be and is made mandatory on all officers concerned to make such reduction." SDC 57.4003.

The remaining sections of the act deal with preparation and distribution of the stamps (57.4002), enforcement (57.4004), and penalties (57.9936-37).

The plaintiff, since prior to 1931, has owned and operated a grocery at Alexandria. His complaint alleges, and his proof tends to show, that the tax prevented and discouraged the purchases of olemargarine at his store and destroyed what had been a profitable department of his retail business.

Viewing the act as a revenue measure, it was urged that because the differences between butter and olemargarine are insufficient to justify separate classification, the statutes in operation subject plaintiff to unequal and non-uniform taxation contrary to Article 6, Sec. 17, of the Constitution of South Dakota and the Fourteenth Amendment to the Con-

stitution of the United States. The trial court sustained the contention of the plaintiff.

The act as a whole indicates that it is aimed at dealers in butter substitutes and reflects an intention to lay an excise tax upon the privilege or occupation of selling butter substitutes to consumers. State ex rel. Botkin *v.* Welsh, 61 S. D. 593, 251 N. W. 189; In re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; State ex rel. Sioux Falls Motor Co. *v.* Welsh, 65 S. D. 68, 270 N. W. 852; and Barnes *v.* Stout, 65 S. D. 592, 276 N. W. 920. We so construe it. It is a settled principle, dealing with such occupational or privilege taxes, that if the classification is justified, the cited constitutional provisions are satisfied if equal treatment is accorded all within the class. State ex rel. Botkin *v.* Welsh, supra. We turn to the matter of classification.

A short answer to the contention that the classification is not justified seems adequate in view of the undisputed facts and the settled state of the law.

Plaintiff is engaged in the business of selling olemargarine which conforms to the standards promulgated as of September 6, 1941, under the Federal Food, Drug and Cosmetic Act of 1938. Although the product plaintiff sells and butter are both foods and the one is used as a substitute for the other, they are essentially different. The one is the product of the factory while the other stems from the cow and very largely from our great dairy industry. It must be conceded the legislature could reasonably conclude that the costs which go into the butter sold to consumers in our state embrace a substantial contribution to state revenues, while the costs which enter into the production of oleomargarine sold to our consumers include but a very slight contribution to state revenues. Further, it could, we think, reasonably conclude that the fiscal interests of the state would be served by encouraging our dairy industry.

The test to be applied to the act is the same under both constitutions. Is the classification reasonable, and does it bear some relation to the subject in hand, are the questions to be answered. State ex rel. Botkin *v.* Welsh, supra. The legislature is clothed with a broad discretion in dealing with the intensely practical problem of providing adequate public revenue. If its ultimate decisions are based on

reason, they may rest on very narrow distinctions. The facts stated demonstrate that the classification is valid because founded upon differences related to state revenue. Cf. Great Northern Railway Co. *v.* Whitfield, 65 S. D. 173, 272 N. W. 787, 111 A.L.R. 1475; and Montgomery Ward & Co. *v.* Commissioner of Taxation, 216 Minn. 307, 12 N. W. 2d 625. The precise classification has been upheld by the United States Supreme Court, Magnano Co. *v.* Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109. And see Southwestern Oil Co. *v.* State of Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237; and Ohio Oil Co. *v.* Conway, 281 U. S. 146, 50 S. Ct. 310, 74 L. Ed. 775.

The trial court sustained a further contention of plaintiff that although the challenged enactment was a revenue measure in form, it was motivated by a primary legislative purpose to curtail and prohibit the manufacture, sale and consumption of olemargarine and was therefore repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States, and to sections 1 and 2 of Article VI of the Constitution of South Dakota.

This phase of the decision of the trial court is in the teeth of the holding of the Supreme Court of the United States in the case of Magnano Co. *v.* Hamilton, supra, wherein that court sustained the validity of a similar statute of the State of Washington, and of many other pronouncements of that court which establish the principle that if an act appears on its face to be constitutional, to inquire into the motives of the legislative body for the purpose of declaring it unconstitutional is beyond the competency of the courts. Sonzinsky *v.* United States, 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772; Henneford *v.* Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814; and McCray *v.* United States, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

In Sonzinsky *v.* United States, supra, where the National Firearms Act, 26 U.S.C.A. (1934 Ed.) Sec. 1132, was under attack, the contention was that "the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states be-

cause not granted to the national government." This contention rested on the amount of the tax.

The court said:

> "On its face it is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.
>
> "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect. (Citing cases); and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. (Citing cases.)
>
> "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. (Citations) They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution." (Citations)

In Hanneford *v.* Silas Mason Co., supra, the attack was upon a statute of the State of Washington imposing a use tax. The court said, "We are told that a tax upon the use, even though not unlawful by force of its effects alone, is vitiated by the motives that led to its adoption. These motives cause it to be stigmatized as equivalent to a protective tariff. But motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful."

In McCray *v.* United States, supra, the contention was that an Act of Congress imposing an excise of ten cents a pound on oleomargarine colored any shade of yellow so as to look like butter was motivated by a purpose to exercise a power of regulation reserved to the states and was

therefore invalid. In rejecting the contention that it could strike down what appeared on its face to be a lawful exercise of power on the assumption that a wrongful motive caused the power to be exerted, the court said,

> "It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in Champion *v.* Ames, 188 U. S. 321, where, speaking through Mr. Justice Harlan, it was said:
>
> " 'But if what Congress does is within the limits of its power, and is simple unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons *v.* Ogden, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." ' "

In Magnano Co. *v.* Hamilton, supra, as we have indicated, the act assailed required one engaged in the business of selling butter substitutes to pay an excise tax of fifteen cents per pound on substitutes sold. In dealing with a contention similar to the one made below the court said:

> "The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the legislature ascertained, from the language of the act, and the

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words used therein are to be given their ordinary meaning unless the context shows that they are differently used. Child Labor Tax Case," (Bailey *v.* Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 820, 21 A. L. R. 1432). "If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the Veazie Bank case," (Veazie Bank *v.* Fenno, 8 Wall. 533, 19 L. Ed. 482) "where it was urged that the tax was 'so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank'; in the McCray case, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the Alaska Fish case" (Alaska Fish Salting & By-Products Co. *v.* Smith, 255 U. S. 44, 41 S. Ct. 219, 65 L. Ed. 489) "from which we have just quoted; and in the Child Labor Tax Case, where it was held that the intent of Congress must be derived from the language of the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden.

"From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case."

On the other hand, where the motive or purpose to exert a power not possessed is plainly revealed on the face of the legislative act, the Supreme Court of the United States has not hesitated to pronounce the act unconstitutional and invalid. Child Labor Tax case, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A. L. R. 1432; Hill *v.* Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822; and United States *v.* Constantine, 296 U. S. 287, 56 S. Ct. 223, 80 L. Ed. 233.

In the Child Labor Tax Case, supra, for example the statute in question purported to lay an excise of ten per cent of the net profits received during a year in which an employer of a described kind employed children under certain ages and longer than specified hours. The Court said:

> "The law is attacked on the ground that it is a regulation of the employment of child labor in the States —an excessively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by Sec. 8, Article I, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall pre-

vent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. * * * In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it? * * *

"Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. * * *"

That the decisions from which we have quoted rule the Federal issue embraced in this contention of plaintiff and establish the error of the trial court in dealing with that branch of the case, we do not doubt. We share the views expressed in these decisions and therefore hold that the trial court also erred in pronouncing the act repugnant to sections 1 and 2 of Article VI of the Constitution of South Dakota. The principles announced in the cited cases have gained universal support. 11 Am. Jur. 818.

The purpose of the legislature to "tax" is expressed in unambiguous language. The act reveals no other purpose.

The legislature possessed the power to impose an excise tax of the character and kind the act describes. State ex rel. Botkin *v.* Welch, supra; In re Watson, supra. The trial court, however, concluded that the legislature had adopted the phraseology of taxation to conceal a purpose to exert a power it did not possess, viz., the power to prohibit the business of selling butter substitutes to consumers. In so concluding the trial court considered a resolution of a tax conference, and a message of the Governor which were before the legislature at the time the act was adopted, a so-called admission in the answer of defendants that the "act was adopted for the purpose of equalizing, to some extent, the tax burden as between the dairy farmer and the oleomargarine and butter substitute industry", together with the burdensome nature of the rate. In other words, the trial court considered facts for the purpose of finding whether the legislature had exerted a lawful power under the influence of an improper motive. This was beyond its competence. Such conduct on the part of the legislature would amount to an abuse of one of its constitutional powers. Power abused does not cease to be power. Control of the exercise of legislative power is not a function of the courts. It is the absence of power to legislate which a court may declare in order to enforce the rights of litigants under the constitutions of the nation and state.

The trial court indicated that the burdensome nature of the rate imposed appeared on the face of the act and was sufficient to warrant a conclusion that the primary purpose was to "prohibit" and not to "tax". The question is asked, "How can the court fail to understand and know what is understood by all others?" We need not determine whether an imposition could be so excessive as to express a legislative intent to exert some power other than the power to raise revenue. The question is not presented by this act. The rate here imposed is within the reach of the legislative power and it operated to produce revenue. Its burdensome nature may give rise to strong suspicion of a purpose to prohibit, but suspicion, even though shared by all men, is not enough to warrant a court in pronouncing a legislative act unconstitutional. We have repeatedly reaffirmed our

adherence to the principle that every presumption is in favor of the validity and propriety of legislative action and that no statute should be held unconstitutional by any court unless its infringement of constitutional restrictions is so plain and palpable as to admit of no reasonable doubt.

That which has been said with reference to the foregoing contention of plaintiff disposes of his remaining proposition. The trial court sustained plaintiff's contention that the challenged act was adopted for the purpose of establishing a subsidy for the butter industry and not for the purpose of raising revenue and was therefore repugnant to section 20 of Article XVII of the Constitution of South Dakota dealing with monopolies and trusts.

Without so deciding, we accept the assumption that a legislative act avowedly creating a subsidy for the benefit of the butter industry would violate public policy as revealed by the cited constitutional provisions. In terms, the act we are considering does not create such a subsidy. On its face it is only a revenue act, and as we have indicated, the legislature was possessed of power to enact this precise measure. The trial court was without power to inquire into the motives of the legislature in exerting this power for the purpose of declaring the act repugnant to Article XVII, section 20, of the state Constitution.

The judgment is reversed, the cause remanded, and the trial court is directed to enter judgment dismissing plaintiff's complaint on the merits.

All the Judges concur.

Polley, J., not sitting.

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CHARLES ELMORE CROPLEY

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Lee Jennette, Appellant

v.

W. R. Wilson, as Director of the Division of Licensing of the State of South Dakota, et al., Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF APPELLANT OPPOSING STATEMENT OF APPELLEES IN OPPOSITION TO NOTING JURISDICTION ON APPEAL

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Press of Judd & Detweiler, Inc., Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

LEO SCHMITT, *Appellant*

v.

W. R. WILDER, as Director of the Division of Licensing of the State of South Dakota, et al., *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF APPELLANT OPPOSING STATEMENT OF APPELLEES IN OPPOSITION TO NOTING JURISDICTION ON APPEAL

The appellees have filed a statement wrongly opposing the jurisdiction of this Court.

1. Appellees argue that the federal questions which appellant seeks to have reviewed have been disposed of in *Magnano Co.* v. *Hamilton*, 292 U. S. 40, and other decisions of this Court. We have discussed this point at length in our statement as to jurisdiction, heretofore filed, and believe it is there satisfactorily demonstrated that the questions involved are substantial.

2. Appellees assert that this Court is bound by and cannot review the holdings of the Supreme Court of South Dakota to the effect that (a) the purpose of the statute in question is to raise revenue and not to prohibit the sale of oleomargarine,

and (b) the legislative history of the statute cannot be considered in determining the purpose of the legislature in enacting it. These assertions are clearly invalid. In a case such as this, decision on the issue of validity turns on the question of legislative purpose. If appellees were right, the statutory right to Supreme Court review of state court decisions sustaining state statutes of this kind against attack on the ground of repugnancy to the Federal Constitution would be completely nullified. This Court has frequently held that "neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect." *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625 (where this Court concluded that the object of a state tax was invalid both from the face of the statute and from its legislative history, in the form of a report of a special committee appointed by the legislature to investigate the subject of taxation); *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280; *Harvester Co.* v. *Dept. of Taxation*, 322 U. S. 435, 441.

3. In our jurisdictional statement we distinguished the *Magnano* case on the ground, among others, that there the trial court had not found, as it has here, that the statute had been directly responsible for the destruction of all the oleomargarine business in the state. Appellees dispute this distinction, asserting that it was stipulated at the *Magnano* trial that no oleomargarine sales had been made in the state since passage of the statute. It was so stipulated. But the point is that there the parties seriously disagreed as to the reason for

the cessation of sales, the trial court did not find that the statute had been the cause, and in fact it concluded that the complainant had failed to prove that the statute was prohibitive. *A. Magnano Co.* v. *Dunbar*, 2 F. Supp. 417, 423 (W. D. Wash.). Here the finding is to the contrary, as appellees concede.

4. Appellees state that the trial court's finding in the case at bar that the statute had been directly responsible for the destruction of all oleomargarine business in South Dakota "is wholly unsupported by any evidence," and they assert other reasons for that result. We think that the trial court's finding is fully supported by the evidence. In any event, if the Court is to decide this question, it must take jurisdiction and hear argument.

5. Appellees contend that the courts may not consider legislative history in determining legislative purpose. This Court has held the contrary. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 632-633. See also the discussion and cases cited at end of our statement as to jurisdiction.

6. Appellees argue that, if there was any inherent weakness in this statute when originally enacted in 1931, it has been cured by re-enactment of the provisions in the South Dakota Code of 1939. Presumably this argument is directed to the right of the courts to consider the legislative history of the original enactment. Obviously, however, it is the legislative purpose at the time of original enactment, and consequently the legislative history bearing on that purpose, which are significant here. Cf. *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 212-213; *Anderson* v. *Pacific Coast S.S. Co.*, 225

U. S. 187, 198-199; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, footnote at 27-29.

7. Appellees challenge the finding of the trial court that, while there were some oleomargarine sales in the state after the entry of the United States into the war and rationing, those sales would subside after rationing was lifted. We believe that the trial court was justified in basing its conclusion as to the effect of the statute on the normal period from 1931 to the beginning of the war, rather than on the unusual war period. Moreover, if this Court is to consider the significance and accuracy of this finding, presumably it must take jurisdiction and hear argument.

We submit that the questions involved are substantial, and that this Court should note probable jurisdiction.

Respectfully submitted,

ASHLEY SELLERS,
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Counsel for Appellant

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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 733

LEO SCHMITT,

Appellant,

vs.

W. R. WILDER, AS DIRECTOR OF THE DIVISION OF LICENSING OF THE STATE OF SOUTH DAKOTA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

STATEMENT OPPOSING JURISDICTION

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Statutes Cited

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SUPREME COURT OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA SUPREME COURT

DOCKET NO. 8869

LEO SCHMITT,
Plaintiff and Appellant,

vs.

W. R. WILDER, AS DIRECTOR OF THE DIVISION OF LICENSING OF THE STATE OF SOUTH DAKOTA, ET AL.
Defendants and Appellees

STATEMENT OF APPELLEES IN OPPOSITION TO NOTING JURISDICTION ON APPEAL

In opposition to assuming jurisdiction of this appeal and to noting jurisdiction thereof, the appellees assert that there are no substantial constitutional questions arising under the Federal Constitution present on this appeal. The mere reference to provisions of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to note jurisdiction of the appeal. *Sugarman* v. *United States,* 249 U. S. 182.

Jurisdiction on this appeal should not be noted for the reason that all of the questions arising under the Federal

Constitution have heretofore been adequately and fully disposed of and adjudicated by the Supreme Court of the United States. *A. Magnano Company* v. *Hamilton*, 292 U. S. 40, 78 L. Ed. 1109; *McCray* v. *United States*, 195 U. S. 27, 49 L. Ed. 95; *Hammond Packing Company* v. *Montana*, 233 U. S. 331, 58 L. Ed. 985; *Capitol City Dairy Company* v. *Ohio*, 183 U. S. 238, 46 L. Ed. 171; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 56 L. Ed. 350.

The Supreme Court of the State of South Dakota in disposing of the questions arising under the Federal Constitution involved in this case relied heavily upon the decision of the Supreme Court of the United States in the case of *A. Magnano Company* v. *Hamilton, supra*, so well, it might, for the reason that the Supreme Court of the United States, in the *A. Magnano Company* case, would adjudicate all of the questions involved on this appeal which might arise under the provisions of the Federal Constitution.

In the *Magnano Company* case, the Supreme Court of the United States had under consideration a law of the State of Washington, imposing a fifteen cents (15¢) per pound excise tax on oleomargarine sold in that state. The law under attack in that case was to all intents and purposes and as far as this appeal is concerned, the same as the provisions of South Dakota Code, Chapter 57.40 and SDC 57.9936 and 57.9937. The Federal Supreme Court held that the Washington statute did not violate the due process clause nor the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The appellant has attempted to differentiate this case from the *A. Magnano Company* case. The appellees contend that the cases simply can not be differentiated.

The appellant says that in the *Magnano* case the Washington statute under attack expressly declared that State

revenues were inadequate and that the tax was imposed to provide additional revenues, while in the instant statute, it is provided that "from the total amount of taxes to be raised by levy against real and personal property, a reduction shall be made equal to the amount of the taxes collected annually under the provisions of this chapter, and the balance, only after such reduction has been made, shall be levied against such real and personal property."

Chapter 57.40 and SDC 57.9936 and 57.9937 as originally enacted by Chapter 258 of the Laws of South Dakota of 1931, contain the same legislative declaration which was contained in the Washington statute. Section 6 of said Chapter 258, Laws of 1931, contains the declaration that "this action is necessary for the support of the state government and its existing institutions, etc." Furthermore, the Supreme Court of the State of South Dakota has held that a replacement provision in a taxing statute does not prevent the same from being a revenue measure. *State ex rel Botkin* v. *Morrison,* 61 S. D. 334, 249 N. W. 563, decided in June, 1933. The Supreme Court of the State of South Dakota, in the instant case, held that the statute under attack was on its face a revenue measure. These decisions of the Supreme Court of the State of South Dakota, as far as that phase of this case is concerned, are binding upon the Supreme Court of the United States. The question whether the statute under attack is a revenue measure does not involve any question arising under the Federal Constitution.

The appellant further calls attention to the fact that in the *A. Magnano* case there was no finding by the lower court, that the tax was directly responsible for the destruction of all the oleomargarine business in the state, or that the primary purpose of the tax was to prohibit rather than to tax. It was stipulated in the lower court in the *Magnano*

case that "since the effective date of said article, no importation or sales have been made" of oleomargarine. 2. Fed. 2nd 414, 417. We wish to call attention to the fact that this finding of the trial court is wholly unsupported by any evidence in this case. The conclusion that the imposition of this tax resulted in the destruction of the plaintiff's business is entirely speculative. The destruction of plaintiff's business in the selling of oleomargarine was due to the economic depression that prevailed from 1939-1940; that this economic depression was especially acute in the State of South Dakota and adjoining states. During this period of time, agricultural products, including dairy products, were at an all time low and butter was one of the articles on a surplus commodity list for free distribution for relief clients.

Appellant further points out that in the *Magnano* case there was no so-called legislative history, as is the case here. The appellant relies upon the report of said voluntary tax conference and association made to the Director of Taxation, who, in return, passed the rest on to the Governor and the Governor in turn incorporated a portion of it in his message to the Legislature in 1931. In the first place, legislative history will not be resorted to by the courts in the interpretation of the statute unless the statute is ambiguous or its meaning obscure. 50 Am. Jur. Section 325, p. 317. "Resort may not, however, be made to an administrative message for the purposes of determining the meaning of a statute which is plain and unambiguous." 50 Am. Jur. Section 325, pp. 317-318. We contend that it would be a rather dangerous rule which would permit the courts to take into consideration what was said by any voluntary group of persons, or a public officer, or even a chief executive, for the purposes of ascertaining the motive of the legislature in enacting a statute.

The Supreme Court of the State of South Dakota in the instant case held that it could not consider legislative history for the purposes of ascertaining the motives of the 1931 legislature. The determination of the court on this phase of the case is likewise binding on the Supreme Court of the United States and presents no questions arising under the Federal Constitution.

We further desire to call your attention to the fact that the State of South Dakota had a complete code revision in 1939 and Chapter 258 of the Laws of South Dakota of 1931 was re-enacted by the 1939 legislature. So we are now dealing with a 1939 law. If there was any inherent weakness which may have existed at the time Chapter 258, Laws of 1931, was enacted, such weakness was cured by re-enactment of the law in 1939. *Reaney* v. *Union County*, 10 N.W. 2d 762, 69 S. D. 392, 12 N.W. 2d 14, 69 S. D. 488.

This action was commenced in the lower court in 1944. At that time the economic depression no longer existed and the plaintiff was selling what would amount to the same as he had been doing prior to the effective date of Chapter 258, Laws of 1931. In this connection, the trial court found that after the entry of the United States into the war and the rationing of food, including butter, there were some sales of oleomargarine in the state, but that those sales did subside after rationing was lifted. We do not believe that the appellant will contend that there is any evidence to support this so-called finding of fact. This was a prophecy by the trial court and not a finding of fact at all.

The appellees therefore respectfully submit that the decision of the Supreme Court of the State of South Dakota in this case should not be reviewed on appeal in the Supreme Court of the United States for the reason that all of the issues involved in this case have already been fully and ade-

quately disposed of by the decisions of the United States and particularly by the *A. Magnano* case.

Respectfully submitted,

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Attorney General;
BENJAMIN D. MINTENER,
Assistant Attorney General;
RAY F. DREWRY,
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Pierre, South Dakota.

(5870)

No. 733. SCHMITT *v.* WILDER, DIRECTOR OF LICENSING, ET AL. Appeal from the Supreme Court of South Dakota. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Ashley Sellers* and *Kenneth L. Kimble* for appellant. *Ray F. Drewry,* Assistant Attorney General of South Dakota, for appellees. Reported below: 71 S. Dak. 575, 27 N. W. 2d 910.